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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DCP FARMS, et al.,

Petitioners,

v.

SECRETARY OF AGRICULTURE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In an administrative proceeding to determine a party's eligibility to receive federal benefits, does Congressional interference that dictates the outcome of the ultimate decision violate the Due Process rights of the applicant to a fair and impartial hearing and to the appearance of a fair and impartial hearing?

Whether administrative remedies must be exhausted if an intra-agency appeal is not made a prerequisite to judicial review, the agency decision is operative, and the same officials who would review that decision made the decision and were, in fact, tainted by Congressional interference.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, DCP Farms, Flowers Farms, Increase Plantation, Matagorda Plantation, Omega Plantation, and Flowers & Parker Farms.

The respondents before this Court include the Secretary of Agriculture and the United States Department of Agriculture.

Petitioners have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

GROUNDS FOR THIS COURT'S JURISDICTION 2

REGULATION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

A. The Fifth Circuit's Decision Is Fundamentally At Odds With Decisions Of This Court And Other Circuits 9

B. The Fifth Circuit's Decision Requiring Exhaustion of Administrative Appeals to the Same Government Officials Who Have Already Ruled on the Issue and Were Tainted By Congressional Interference Conflicts With Decisions of This Court and Other Courts of Appeal 14

CONCLUSION 18

APPENDICES:

A. Opinion, United States Court of Appeals for the Fifth Circuit, reported at 957 F.2d 1183. . . . . 1a

B. Order of United States Court of Appeals for the Fifth Circuit denying Petition for Rehearing and Request for Reconsideration *en banc*, dated April 22, 1992. . . . . 1b

C. Opinion, Judgment, and Order of the District Court for the Northern District of Mississippi, reported at 761 F. Supp. 1269. . . . . 1c

D. United States Department of Agriculture Appeal Regulations, 7 C.F.R. Part 780. . . . . 1d

TABLE OF AUTHORITIES

CASES	PAGES
Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496 (9th Cir. 1980)	17
American Bancorp. Inc. v. Bd. of Governors of the Fed. Reserve Sys., 509 F.2d 29 (8th Cir. 1974)	12
Association of Nat'l Advertisers v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980)	11
Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915)	10
Bowen v. City of New York, 476 U.S. 467 (1986)	16
Bread Political Action Comm. v. Federal Elections Comm'n, 455 U.S. 577 (1982)	13
Brown v. McGarr, 774 F.2d 777 (7th Cir. 1985)	11
Cafferello v. United States Civil Service Comm'n, 625 F.2d 285 (9th Cir. 1980)	17
Cassim v. Bowen, 824 F.2d 791 (9th Cir. 1987)	16
D.C. Fed'n of Civic Assns. v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972)	10
Doty v. United States, 24 Cl. Ct. 615 (1991)	13
Esch v. Yeutter, 876 F.2d 976 (D.C. Cir. 1989)	12
Goldberg v. Kelly, 397 U.S. 254 (1969)	11
Gratz v. United States, 25 Cl. Ct. 411 (1992)	15
Hanson v. Madigan, 788 F. Supp. 403 (W.D. Wis. 1992)	12

Health Equity Resources, Urbana, Inc. v. Sullivan, 927 F.2d 963 (7th Cir. 1991) 16

Independent Bankers Assn. of Georgia v. Bd. of Governors of the Fed'l Reserve Sys., 516 F.2d 1206 (D.C. Cir. 1975) 12

INS v. Chadha, 362 U.S. 919 (1983) 8

Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir.), *cert. denied*, 439 U.S. 1052 (1978) 10

Londoner v. Denver, 210 U.S. 373 (1908) 10

Mathews v. Eldridge, 424 U.S. 319 (1976) 16

Patagonia Corp. v. Bd. of Governors of the Fed'l Reserve Sys., 517 F.2d 803 (9th Cir. 1975) 12

Patsy v. Florida Int'l Univ., 634 F.2d 900 (5th Cir. 1981) 15

Petry v. Black, 697 F.2d 1169 (D.C. Cir. 1983) 14

Pillsbury Co. v. Federal Trade Comm'n, 354 F.2d 952 (5th Cir. 1966) 9, 10

Sioux Valley Hospital v. Bowen, 792 F.2d 715 (8th Cir. 1986) 17

Sullivan v. Finkelstein, 110 S. Ct. 2658 (1990) 14

Swartz v. United States, 14 Cl. Ct. 570 (1988) 13

Tataranowicz v. Sullivan, 959 F.2d 268 (D.C. Cir. 1992) 16

United States v. Batson, 782 F.2d 1307 (5th Cir.), *cert. denied*, 447 U.S. 906 (1986) 12

United States v. Florida E. Coast Ry., 410 U.S. 224 (1973) 10, 11

United States v. Yarbrough, 290 F. Supp. 4 (N.D. Miss. 1968) 13

Vculek v. Yeutter, 754 F. Supp. 154 (D.N.D. 1990), *aff'd sub nom. Vculek v. Madigan*, 950 F.2d 727 (8th Cir. 1991) 15

Weinberger v. Salfi, 422 U.S. 749 (1975) 16

Weir v. United States, 310 F.2d 149 (8th Cir. 1962) 12

Willis v. Sullivan, 931 F.2d 390 (6th Cir. 1991) 16

STATUTES AND REGULATIONS

5 U.S.C. § 704 15

28 U.S.C. § 1254(1) 2

7 C.F.R. § 245.7 (1991) 6

7 C.F.R. § 246.9 (1991) 6

7 C.F.R. § 247.20 (1991) 6

7 C.F.R. § 273.15 (1991) 6

7 C.F.R. § 400.93 (1991) 6

7 C.F.R. § 614.7 (1991) 7

7 C.F.R. § 780 (1990) 2, 12, 15

7 C.F.R. § 1900.55 (1991) 7

10 C.F.R. § 2.1205 (1990) 7

14 C.F.R. § 1240.107 (1991) 7

20 C.F.R. § 10.131 (1991) 7

20 C.F.R. § 404.907 (1991) 7

20 C.F.R. § 416.1400 (1991) 7

22 C.F.R. § 7.5 (1991) 7
37 C.F.R. § 1.194 (1990) 7
37 C.F.R. § 2.142 (1990) 7
38 C.F.R. § 3.103 (1991) 7
38 C.F.R. § 19.157 (1991) 7
42 C.F.R. § 405.716 (1991) 7
42 C.F.R. § 405.820 (1991) 7
45 C.F.R. § 205.10 (1991) 7

OTHER AUTHORITIES

Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. Chi. L. Rev. 739 (1976) 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, DCP Farms, Flowers Farms, Increase Plantation, Matagorda Plantation, Omega Plantation, and Flowers & Parker Farms, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on March 23, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, reported at 957 F.2d 1183, is reproduced as Appendix A to this petition. The Order of the Court of Appeals denying a timely petition for rehearing and request for reconsideration *en banc* is reproduced as Appendix B to this petition. The opinion, judgment, and order of the United States District Court for the Northern District of Mississippi, reported at 761 F. Supp. 1269, are reproduced as Appendix C to this petition.

GROUNDS FOR THIS COURT'S JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 23, 1992. On April 22, 1992, the Fifth Circuit denied petitioners' suggestion for rehearing en banc, which it also treated as a suggestion for panel rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REGULATION INVOLVED

7 C.F.R. Part 780, reproduced as Appendix D to this petition.

STATEMENT OF THE CASE

Petitioners are farmers who raise cotton, rice, and other crops on land situated primarily in Tunica County and Coahoma County, Mississippi. Respondents administer certain annual federal farm commodity programs through the Agricultural Stabilization and Conservation Service ("ASCS"), an agency within the United States Department of Agriculture ("USDA").

In April 1989, the Tunica County and Coahoma County, Mississippi Committees of ASCS approved petitioners' farm operating plans for 1989, thus entitling petitioners to federal farm program benefits for that year. RA 33-48. Congressman Jerry Huckaby of Louisiana, Chairman of the Subcommittee on Cotton, Rice and Sugar of the House Agriculture Committee, was infuriated by these decisions and orchestrated a campaign to have them reversed by USDA:

> 1. At the very time petitioners' 1989 farm operating plans were under review by the Office of the Deputy Administrator for State and County Operations ("DASCO") of ASCS, William Penn, Assistant DASCO, and John Campbell, Deputy Under Secretary of Agriculture for Commodity Programs, met with staffers working for Chairman Huckaby,

who stated that they were very concerned about petitioners' farm operating plans. TR. 79-82; RA 52-53, 62, 150-51; PX-1, at 92. As a result of this meeting, the Under Secretary's Office issued the unprecedented order, contrary to respondent's operating procedures, that all further actions relating to petitioners' farm operating plans were to take place only at the national level of USDA. RA 60, 62, 149-51; TR. 126-27; PX-1, at 106, 122-23.

2. Chairman Huckaby then wrote to Agriculture Secretary Yeutter "specifically regarding the plaintiffs' eligibility for federal farm program benefits" and "strongly urged the Secretary to adopt the conclusion that the reorganization of the [petitioners'] farming operations was a scheme or device." RA 49, 147-48. Chairman Huckaby wrote that:

> "As the principal sponsor of the legislation which established the new payment limitation eligibility requirements, included in the Omnibus Budget Reconciliation Act of 1987 (P.L. 100-203), I feel strongly that the aforementioned operation violates both the spirit and letter of the law. It was clearly not the intent of Congress that such operations would qualify for such vast sums; if this operation does receive the reported 1.4 million dollars, it will only happen because USDA has failed to implement and enforce the law as intended by Congress.

RA 49, 147-48. Congressman Huckaby admonished the Secretary that if the agency did not take action to correct this situation, he would enact legislation

taking away the agency's discretion to act in the matter. RA 51, 148-49.

3. Chairman Huckaby's letter was forwarded to William Penn, who was at the time reviewing the decisions of the County Committees, and Mr. Penn prepared a response assuring Chairman Huckaby that USDA "will take a very aggressive position" in dealing with petitioners' farm operating plans. TR. 84-85, 95, 98, 118; RA 52, 149, 157.

4. On June 1, 1990, USDA, as urged by Chairman Huckaby, overturned the decisions of the County Committees approving petitioners' 1989 farm operating plans, made initial decisions denying their 1990 farm operating plans, and decided that petitioners were ineligible to receive any federal farm program benefits whatsoever for the 1989, 1990 and 1991 crop years on the ground that they had engaged in a scheme or device. RA 67-76, 149-50.

Petitioners initiated the instant action seeking declaratory and injunctive relief on two grounds: (1) that the June 1, 1990 decisions made by DASCO were improperly tainted by Congressional interference in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution; and, (2) that DASCO's decisions were arbitrary, capricious, an abuse of discretion and contrary to law, in violation of the Administrative Procedure Act. RA 2.

The district court found in favor of petitioners, holding that the Congressional interference not only created an appearance of bias or pressure, but also that respondents' June 1, 1990 decisions were actually influenced by impermissible Congressional interference. Accordingly, the court held that petitioners were deprived of their Due Process rights to a fair and impartial hearing in violation of the Fifth Amendment to the United States Constitution. Appendix, pp. 8c-9c, 12c-13c.

The district court specifically found that Chairman Huckaby exerted impermissible influence upon officials of USDA in order to dictate the outcome of the pending proceedings involving petitioners' eligibility for farm program benefits. Appendix, pp. 8c-9c. The district court rejected, as "simply unconvincing," respondents' argument that Congressman Huckaby was merely urging the enforcement of the law, because there had been presented no evidence, other than Chairman Huckaby's communications to USDA, that asserted that petitioners' farm operating plans were contrary to the spirit and intent of the controlling legislation. Appendix, pp. 9c, 14c. The district court found not only that the administrative process had been impermissibly tainted by Congressional interference, but also that such interference rendered further administrative proceedings at the national level of USDA futile. Appendix, pp. 11c-12c. Accordingly, the district court vacated respondents' June 1, 1990 decisions and enjoined the national level of USDA from participating further in any decisions or administrative appeals concerning petitioners' eligibility for federal farm program benefits for the 1989, 1990 or 1991 crop years. Appendix, pp. 16c-17c.

On March 23, 1992, a panel of the Fifth Circuit reversed the district court's decision, holding that Chairman Huckaby's contacts occurred "well before any proceeding which could be considered judicial or quasi-judicial." Appendix, p. 6a. The panel held that "contact between a congressman and the USDA involving a pending proceeding that was neither quasi-judicial or judicial" does not violate due process rights "unless it causes the administrator to consider extraneous factors in reaching his decision." Appendix, pp. 1a-2a. The panel concluded that no such extraneous factors were present in this case. Appendix, p. 8a. Moreover, the panel, *sua sponte*, held that there was insufficient evidence "to support a finding of futility" and that the district court abused its discretion by reviewing the agency decision prior to exhaustion of administrative procedures. Ap-

pendix, pp. 9a-10a. The panel reversed the judgment of the district court and remanded with instructions to dismiss. Appendix, p. 11a. On April 22, 1992, the Fifth Circuit denied petitioners' suggestion for rehearing en banc, which it also treated as a suggestion for panel rehearing. Appendix pp. 1b-2b.

REASONS FOR GRANTING THE WRIT

This case presents an issue that has far-reaching implications regarding the most fundamental of all due process rights for individuals and businesses applying for eligibility under federal benefit programs: the right to a fair and impartial decisionmaker and, equally important, the right to the appearance of a fair and impartial decisionmaker. The Fifth Circuit's decision in this case makes these due process rights turn on the formality of the administrative decisionmaking process rather than on the nature of the decision itself. The Fifth Circuit thus ignored the fundamental nature of an adjudicative or quasi-adjudicative proceeding as one in which disputed facts in particular cases are decided.

Numerous federal benefit programs employ administrative proceedings similar to the one employed by USDA in the instant case and thousands of persons annually have their eligibility for benefits determined under such government programs. These programs run the gamut from pension and death benefits for veterans to nuclear reactor licensing.[1] Participants in these

[1] The following federal benefit programs do not provide for a hearing at the time of the initial determination: *Department of Agriculture:* Food and Nutrition Service: 7 C.F.R. § 245.7 (1991) (National School Lunch Program, School Breakfast Program, Special Milk Program benefit eligibility determinations); 7 C.F.R. § 246.9 (1991) (Special Supplemental Food Program for Women, Infants and Children benefit eligibility determinations); 7 C.F.R. § 247.20 (1991) (Commodity Supplemental Food Program benefit eligibility determinations); 7 C.F.R. § 273.15 (1991) (Food Stamp Program eligibility determinations). Federal Crop Insurance Corporation: 7 C.F.R. § 400.93 (1991) (federal crop insurance eligibility determinations). Farmers Home

programs will be severely and adversely affected by the Fifth Circuit's holding that the due process right to the appearance of an impartial decisionmaker does not apply in such situations unless the decision is made following an adjudicative hearing.

The panel's decision of what constitutes an adjudicative or quasi-adjudicative proceeding is fundamentally at odds with the decisions of this Court and other Circuits. Moreover, the panel's decision has undermined the due process right to the appearance of impartiality, thus negating an essential prong to the due process protections accorded to those subjected to administra-

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Administration: 7 C.F.R § 1900.55 (1991) (farm loan and grant eligibility determinations). Soil Conservation Service: 7 C.F.R. § 614.7 (1991) (Conservation Reserve Program eligibility determinations). *Department of Commerce:* Patent and Trademark Office: 37 C.F.R. § 1.194 (1990) (patent protection eligibility determinations); 37 C.F.R. § 2.142 (1990) (trademark protection eligibility determinations). *Department of Labor:* Office of Workers' Compensation Programs: 20 C.F.R. § 10.131 (1991) (Federal Employee Compensation Act disability and death benefit eligibility determinations). *Department of State:* 22 C.F.R. § 7.5 (1991) (United States nationality and passport application determinations). *Department of Veterans Affairs:* 38 C.F.R. §§ 3.103, 19.157 (1991) (disability, death, pension, training and rehabilitation, educational assistance, life insurance, burial, loan, surviving spouse and dependent benefit eligibility determinations). *Health and Human Services:* Social Security Administration: 20 C.F.R. § 404.907 (1991) (federal old-age, survivors and disability insurance benefit eligibility determinations); 20 C.F.R. § 416.1400 (1991) (social security benefit eligibility determinations for the aged, blind, and disabled). Family Support Administration: 45 C.F.R. § 205.10 (1991) (welfare benefit eligibility determinations for programs, such as: Aid to Families with Dependent Children, Older Americans Act, Aid to the Blind, Aid to the Aged, Blind, or Disabled, Aid to the Permanently and Totally Disabled). Health Care Financing Administration: 42 C.F.R. § 405.716 (1991) (Medicare benefit eligibility determinations); 42 C.F.R. § 405.820 (1991) (Supplementary Medical Insurance Program eligibility determinations). *NASA:* 14 C.F.R. § 1240.107 (1991) (scientific and technical contribution award eligibility determinations). *Nuclear Regulatory Commission:* 10 C.F.R. § 2.1205 (1990) (nuclear reactor license eligibility determinations).

tive decisionmakers. As a result of the Fifth Circuit's decision, each of these proceedings is vulnerable to Congressional interference. This Court should grant review to assure that Congressional interference with administrative decisions in particular cases, whether called adjudicative or quasi-adjudicative, or neither, is not condoned, particularly when such interference undermines the due process right to the appearance of impartiality.

Unless overturned by this Court, the standards for due process protection have been so narrowly drawn that Congressional interference with administrative decisions will be encouraged when those decisions do not comport with a powerful Congressman's view of how a statute should be applied to a particular situation. Indeed, it will further encourage powerful Congressmen to dictate to the agency decisionmaker the outcome of particular cases by, *inter alia*, exhorting the decisionmaker to adopt the Congressmen's "subsequent legislative history."

In *INS v. Chadha*, 362 U.S. 919 (1983), this Court invalidated a formal oversight mechanism - the legislative veto - because such a mechanism ignored the constitutionally mandated processes of government. Allowing informal Congressional pressure to be exerted in a surreptitious manner so as to control the kind of decision made here undermines the notions of open and responsible government and allows the legislature to have unconstitutional influence on a decision duly delegated to the executive branch. It is virtually impossible for an administrator to reject such pressure, particularly where, as was the case here, the Congressman exerting the pressure sponsored the legislation at issue and wields considerable power over the funding, jurisdiction, and legislative agenda of the agency or department. If left to stand, the Fifth Circuit's decision creates a void where informal Congressional pressure can be applied to

dictate the outcome of administrative decisions without recourse by those affected by such adverse pressure.

A. The Fifth Circuit's Decision Is Fundamentally At Odds With Decisions Of This Court And Other Circuits

In *Pillsbury Co. v. Federal Trade Comm'n*, 354 F.2d 952 (5th Cir. 1966), the Court of Appeals for the Fifth Circuit held that Congressional pressure on two members of the Federal Trade Commission urging the Commission to change its interpretation and application of Section 7 of the Clayton Act in a merger case pending before the Commission deprived the respondent of its Constitutional right to due process. 354 F.2d at 964. The court held that Congressional interference constituted a violation of due process where such interference —

> focuses directly and substantially upon the mental decisional processes of a Commission *in a case which is pending before it*, . . . we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences.

354 F.2d at 964 (emphasis in original). The court concluded that such an inquiry "sacrifices the appearance of impartiality — the sine qua non of American *judicial* justice — in favor of some short-run notions regarding the Congressional intent underlying an amendment to a statute, unfettered administration of which was committed by Congress to the Federal Trade Commission." *Id.* (emphasis in original).

Where agency proceedings are adjudicatory in nature, it is not even necessary to demonstrate that the Congressional interference *actually* influenced the action in order for it to be deemed invalid. Due process requires that the agency action be in-

validated if Congressional interference creates even the *appearance* of bias or pressure. *Pillsbury*, *supra*, 354 F.2d at 964. *See D.C. Fed'n of Civic Assns. v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972) (when an agency is acting in a judicial capacity the decision is invalid "if based in whole or in part on pressures emanating" from Congress); *Koniag, Inc. v. Andrus*, 580 F.2d 601 (D.C. Cir.), *cert. denied*, 439 U.S. 1052 (1978) (letter from Congressman "compromised the appearance of the Secretary of the Interior's impartiality").

The panel below refused to apply the *Pillsbury* doctrine in this case because it determined that the Congressional interference here occurred "well before any proceeding which could be considered judicial or quasi-judicial." Appendix, p. 6a. The panel concluded that "[t]his case would not have reached the stage when it could fairly be called adjudicative or quasi-judicial until the hearing which was scheduled for December 1990." *Id.* Instead, the panel applied the standard for evaluating congressional interference with non-adjudicatory actions of administrative agencies, to wit:

> whether the communication actually influenced the agency's decision. More specifically, the test is "whether 'extraneous factors intruded into the calculus of consideration' " of the individual decision-maker.

The Fifth Circuit's decision cannot be squared with precedents of this Court. In *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 244-46 (1973), this Court defined adjudicative proceedings as those where "disputed facts in particular cases" are decided. In so holding, this Court rejected the approach adopted by the Fifth Circuit here, reasoning that the proper focus is on the nature of the decision, not the formality of the process used to reach it. Thus, the Court stated that the administrative procedures employed in *Londoner v. Denver*, 210 U.S. 373 (1908), and *Bi-Metallic Inv. Co. v. State Bd. of Equalization*,

239 U.S. 441 (1915), were both adjudications despite the fact that there was a hearing in the latter case but not in the former because both proceedings were "designed to adjudicate disputed facts in particular cases." 410 U.S. at 245. Similarly, in *Goldberg v. Kelly*, 397 U.S. 254, 265 (1969), this Court recognized that an initial agency decision to terminate an individual's welfare benefits were "summary adjudications" despite the availability of a hearing to reconsider the initial determination of eligibility.

The Fifth Circuit's decision also is at odds with the decisions of several of the courts of appeal holding that the determination of whether a decision is adjudicatory depends upon the substantive nature of the decision and its impact on particular parties. For example, in *Brown v. McGarr*, 774 F.2d 777, 780 (7th Cir. 1985), the Seventh Circuit, citing *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 244-46 (1973), stated that:

> To determine whether an action was rulemaking or adjudication, courts consider: (1) whether the action is generalized in nature, i.e., whether the action applies to specific individuals or to unnamed and unspecified persons; (2) whether the promulgating agency considers general facts or adjudicates a particular set of disputed facts; and (3) whether the action determines policy issues or resolves a specific dispute between particular parties.

Similarly, in *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980), the District of Columbia Circuit cautioned that in deciding whether administrative action is adjudicatory, the focus is not "on the details of [the] administrative process," but on the "nature" of administrative action." *Id.* at 1161. The D.C. Circuit rejected the approach adopted by the Fifth Circuit here, concluding that an administrative action is adjudicatory if the decision

"affects the rights or liabilities of a party." *Id.* at 1161 n.17. *See also Independent Bankers Ass'n of Georgia v. Bd. of Governors of the Fed. Reserve Sys.*, 516 F.2d 1206, 1215 (D.C. Cir. 1975) (defining adjudication as a proceeding that determines "adjudicative facts"); *Patagonia Corp. v. Bd. of Governors of the Fed. Reserve Sys.*, 517 F.2d 803, 816 (9th Cir. 1975) ("in the context of administrative law . . . adjudicative facts are those that immediately affect only [the] specific litigants"); *American Bancorp. Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 509 F.2d 29, 36 (8th Cir. 1974) ("adjudicative facts are the facts about the parties and their activities").

DASCO's decision here was clearly adjudicative in nature because it applied legal standards to the facts of a specific case in order to determine particular applicants' eligibility for federal benefits. Indeed, numerous courts have concluded that respondent's "Appeal Regulations,"[2] the procedures employed by the ASCS to determine a person's eligibility for federal farm program benefits, are adjudicatory.[3]

The supposed separation between the initial administrative decisionmaking process, which the Fifth Circuit held is not adjudicative, and the administrative reconsideration and appeal

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[2] 7 C.F.R. Part 780. These Appeal Regulations specifically provide that they are "limited to only individual determinations" and that "there is no review under this Part with respect to general program requirements that are applicable to all program participants." 7 C.F.R. § 780.1(b); Appendix, p. 2d.

[3] *See Esch v. Yeutter*, 876 F.2d 976, 993 (D.C. Cir. 1989) (detailing the decisionmaking process for agricultural subsidy programs from the county committee level up to DASCO and holding that "there were serious questions as to whether the *adjudicative officials at any given point* considered all relevant factors in reaching their determination) (emphasis added); *United States v. Batson*, 782 F.2d 1307, 1313 (5th Cir.) (referring to the decisionmaker at the county and national levels as an "adjudicator"), *cert. denied*, 447 U.S. 906 (1986); *Weir v. United States*, 310 F.2d 149, 156 (8th Cir. 1962) (referring to the county committee's initial determination of the amount of farm benefits as an "adjudication"); *Hanson v. Madigan*, 788 F. Supp. 403

process, which the panel below concedes is quasi-judicial, is completely artificial and the panel's statement that a farmer may appeal the adverse determination "to a USDA hearing officer" is erroneous. Appendix, p. 2a. As the June 1, 1990 determinations themselves make clear, any such "appeal" in this case would have been to, and decided by, DASCO itself. RA 69, 73, 76.

In any event, the Fifth Circuit erred in holding that no extraneous factors were considered by USDA. Chairman Huckaby plainly sought to dictate the outcome of the administrative proceedings involving the eligibility of *specific* farmers for federal benefits by (1) injecting into the agency's "calculus of consideration" his view of the "intent of Congress" in enacting the payment eligibility requirements at issue and (2) explicitly threatening to enact legislation to eliminate USDA's discretion regarding the eligibility of trusts and estates for farm program benefits by making all such entities — including petitioners — ineligible for program payments, beginning retroactively with the 1989 crop year. RA 50, 148.

It is well settled that an individual Congressman's view of Congressional intent is irrelevant and should be given no weight by the agency charged with administering the law. *See, e.g., Bread Political Action Comm. v. Federal Elections Comm'n,*

(W.D. Wis. 1992) (referring to the ASCS, which administers disaster relief to farmers, as "a three-tiered organizational and adjudicative structure with offices at the county, state and national levels"); *United States v. Yarbrough*, 290 F. Supp. 4, 6 (N.D. Miss. 1968) (referring to the three-tiered ASCS appeal structure that determines whether applicants are eligible for farm subsidies as an "intra-agency adjudicatory process"); *Doty v. United States*, 24 Cl. Ct. 615, 630 (1991) (characterizing respondents' appeal regulations as a three-tiered "adjudication process"); *Swartz v. United States*, 14 Cl. Ct. 570, 572 (1988) (referring to determinations by ASCS' three-tiered structure that administers farm subsidies in the form of commodity price support loans as an "adjudication"). *See also* Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. Chi. L. Rev. 739, 761 & n. 84 (1976) (characterizing ASCS determinations pursuant to 7 C.F.R. § 780 as informal adjudication).

455 U.S. 577, 582 n.3 (1982); *Petry v. Black*, 697 F.2d 1169, 1171 (D.C. Cir. 1983). Moreover, such "subsequent legislative history" is inherently unreliable. As Justice Scalia stated in *Sullivan v. Finkelstein*, 110 S. Ct. 2658, 2667 (1990) (Scalia, J., concurring), —

> . . . the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed. . . . Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.

By definition, therefore, Congressman Huckaby's attempt to inject his view of Congressional intent was an "extraneous factor" in the agency's determination regarding petitioners' eligibility for farm program benefits. Similarly, the Chairman's threat to enact legislation that would retroactively render all trusts and estates — including petitioners' — ineligible for farm program benefits was, by any reasonable standard, a "consideration that Congress could not have intended to make relevant." Appendix, p. 8a.

B. The Fifth Circuit's Decision Requiring Exhaustion of Administrative Appeals to the Same Government Officials Who Have Already Ruled on the Issue and Are Tainted By Congressional Interference Conflicts With Decisions of This Court and Other Courts of Appeal

The district court held that petitioners were not required to exhaust their administrative remedies because (1) the administrative process was unlawful or unconstitutional in form or application and (2) the Congressional interference so impermissibly tainted the national level of USDA that further proceedings at that level would be futile. Appendix, pp. 11c-12c. The Fifth Circuit panel reviewed the exhaustion issue *sua sponte*,

holding that the first exception was inapplicable because "the challenge here is not to provisions of the administrative process, but to its alleged subversion," and further holding that petitioners had failed as a matter of law to prove that further administrative appeals would be futile. Appendix, pp. 9a-10a. This holding conflicts with decisions of this Court and other Circuits.[4]

The Fifth Circuit recognized that the exhaustion requirement is not absolute, but held that neither of the two exceptions relied upon by the district court was applicable. First, citing its own ruling in *Patsy v. Florida Int'l Univ.*, 634 F.2d 900, 904

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[4] This holding is also at odds with Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, which provides, in relevant part —

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section *whether or not there has been presented or determined any application* for a declaratory order, *for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.* (emphasis added).

The plain and unambiguous meaning of the statute is that intra-agency appeals are not a prerequisite to judicial review unless a statute or agency rule require otherwise. Moreover, even if a statute or agency rule requires an appeal to a superior agency authority, such an intra-agency appeal is not a prerequisite to judicial review unless the statute or rule provides that the interim determination is inoperative pending such appeal.

This standard is satisfied here. Respondent's own Appeal Regulations not only prohibit appeals from "[d]eterminations made by the Deputy Administrator" (7 C.F.R. § 780.9; Appendix p. 6d), but also do not require participants in the federal farm program to seek review or reconsideration by the Deputy Administrator. *Vculek v. Yeutter*, 754 F. Supp. 154, 155 (D.N.D. 1990), *aff'd sub nom. Vculek v. Madigan*, 950 F.2d 727 (8th Cir. 1991) ("while the regulatory framework allows for an appeal at the national level, it is not required"). Moreover, the applicable regulations do not provide that any such interim determination would be inoperative pending an intra-agency appeal. *Gratz v. United States*, 25 Cl. Ct. 411, 420 (1992).

(5th Cir. 1981), the Fifth Circuit held that exhaustion is not required "when 'the plaintiff contends that the administrative system itself is unlawful or unconstitutional.' " Appendix, p. 9a. This standard conflicts with the standards for determining whether to require exhaustion established by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976) (exhaustion is not required when "the constitutional claim is entirely collateral to [the] substantive claim" and raises "at least a colorable claim" that an unfavorable administrative determination would result in irreparable harm) and *Bowen v. City of New York*, 476 U.S. 467, 484 (1986) (adding that the determination whether to require exhaustion "should also be guided by the policies underlying the exhaustion requirement").[5] Numerous Circuits have formulated tests based upon the principles established in these cases. *See e.g., Tataranowicz v. Sullivan*, 959 F.2d 268 (D.C. Cir. 1992); *Willis v. Sullivan*, 931 F.2d 390 (6th Cir. 1991); *Health Equity Resources, Urbana, Inc. v. Sullivan*, 927 F.2d 963 (7th Cir. 1991); *Cassim v. Bowen*, 824 F.2d 791 (9th Cir. 1987). The Fifth Circuit, however, has adopted an erroneous standard, which requires exhaustion even if the constitutional challenge is collateral to the substantive claim, there is irreparable injury, and no benefit would be gained by allowing the agency to make a determination in the first instance. Such an approach does not comport with the decisions of this Court and of the other Circuits.

Second, while the Fifth Circuit recognized that plaintiffs need not exhaust their administrative remedies if they demonstrate that it would be futile to do so, it held that

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[5] These policies seek to prevent "premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. *Weinberger v. Salfi*, 422 U.S. 749, 755 (1975).

petitioners had failed to prove futility in this case. In reaching this determination, the court ruled that it would not be futile to require petitioners to appeal to the same decisionmaker that issued the June 1, 1990 decisions appealed from in this action. Appendix, pp. 9a-10a.

The Fifth Circuit's ruling requiring petitioners to appeal to the same decisionmaker that made the determinations in the first place directly conflicts with the decisions of several circuits. *See Cafferello v. United States Civil Serv. Comm'n*, 625 F.2d 285, 287 (9th Cir. 1980) (intra-agency appeal to the same review board that had issued an earlier determination not required because it was apparent what the review board's position would have been on a second appeal); *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 499 (9th Cir. 1980) (exhaustion not required when ultimate decisionmaker has already made known his position); *Sioux Valley Hosp. v. Bowen*, 792 F.2d 715 (8th Cir. 1986) (exhaustion not required because the Deputy Administrator had already ruled on the same issue for an earlier year). In this case, the futility of an intra-agency appeal is even more apparent since the ultimate decisionmaker, Mr. Penn, not only made the initial determination but also had been directly subjected to the Congressional interference.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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Dated: July 20, 1992

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1384

DCP FARMS, et al.,

Plaintiffs-Appellees,

versus

CLAYTON YEUTTER, SECRETARY OF AGRICULTURE, AND U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL STABILIZATION & CONSERVATION SERVICE,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Mississippi

March 23, 1992

Before REAVLEY, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

HIGGENBOTHAM, Circuit Judge:

This appeal raises the question of whether the "mere appearance of bias or pressure" standard adopted in *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966), applies to claims of improper congressional interference with an administrative determination of eligibility for farm subsidies. We find that contact between a congressman and the U.S. Department of Agriculture involving a pending proceeding that was neither quasi-judicial nor judicial is not governed by the *Pillsbury*

standard. We hold that in such proceedings congressional contact does not go beyond the pale unless it causes the administrator to consider extraneous factors in reaching his decision. We conclude then that remaining administrative procedures were not tainted and the district court abused its discretion by reviewing the agency decision when these administrative remedies were not exhausted. Judicial intervention in the agency's decision-making process before DCP Farms exhausted its administrative remedies is unjustified without a clear showing of futility. We reverse the district court's grant of injunctive relief and remand the case with instructions to dismiss.

I.

Farmers submit annual farm operating plans, which serve as subsidy applications, to the county Agricultural Stabilization & Conservation Service office. A county committee of local farmers elected by their peers makes an initial determination of eligibility and amount of subsidy. Appeal is to a state committee of farmers appointed by the Secretary. Despite this delegation of decision-making responsibility to the state and local committees, the USDA expressly reserves the right to reverse or modify any determination made by a county or state committee or by the Deputy Administrator. 7 C.F.R. § 1497.2(d). Any producer or participant dissatisfied with a decision at any level may request reconsideration. *Esch v. Yeutter*, 876 F.2d 976, 987, (D.C. Cir. 1989). If the USDA decides to review a determination made at the state or county level, a Deputy Administrator investigates the case and makes an initial determination. If the Deputy Administrator's initial determination is adverse a farmer may appeal to a USDA hearing officer.

DCP Farms are three joint venture farms with cotton, rice, and other crops in Tunica and Coahoma counties, Mississippi. This case arises from attempts by the Department of Agriculture to enforce the statutory limit of $50,000 per "person" in federal crop subsidies against DCP Farms. 7 U.S.C. § 1308. The three

farms, controlled by two families, had created 51 irrevocable trusts to maximize the number of "persons" eligible to receive farm subsidy payments. DCP Farms were slated to receive $1.4 million in subsidies for the 1989 crop year.

After the county committee approved DCP Farms' requested subsidy for the 1989 crop year, the USDA decided to review DCP Farms' eligibility. In September 1989, the USDA's Office of Inspector General released a report of abuses of the farm subsidy program. The report highlighted DCP Farms as an example of egregious violations of the $50,000 per person limit. This report sparked considerable publicity and in late 1989, USDA officials met with Congressional staff involved in agricultural affairs to discuss the issues raised in the OIG report. John Campbell, Deputy Undersecretary of Agriculture for Commodity Programs, and William E. Penn, Assistant Deputy Administrator for State and County Operations of ASCS, attended the meeting. Parks Shackelford, the key staff aide on agricultural issues for Congressman Huckaby, the chairman of the Subcommittee on Cotton, Rice, and Sugar was an active participant. DCP Farms were specifically discussed.

On December 6, 1989, Chairman Huckaby wrote to Agriculture Secretary Yeutter expressing concern about a "number of recent press items reporting abuses of the new farm program payment eligibility regulations." The letter cites DCP Farms as described in the OIG report as an example of continued abuse of the statutory limit on payments. The most pointed part of the letter states

> As the principal sponsor of the legislation which established the new payment eligibility requirements, I feel strongly that the [DCP Farms] operation violates both the spirit and letter of the law. It was clearly not the intent of Congress that such operations would qualify for such vast sums; if this operation does receive the reported $1.4 million, it will only happen

> because USDA has failed to implement and enforce the law as intended by Congress.

Congressman Huckaby urged the Secretary "to carefully review the Tunica County, Mississippi case and any other similar operations." He was particularly concerned about the treatment of 51 irrevocable trusts as "persons" in light of previous assurances from the USDA that it need not codify the treatment of irrevocable trusts and estates, but could leave it to the Secretary to regulate. Congressman Huckaby indicated that if the USDA allowed DCP Farms to treat all 51 irrevocable trusts as "persons," he would introduce legislation to revise the definition of "persons" to exclude trusts entirely.

In response to Congressman Huckaby's letter, Penn drafted a letter which was signed by Campbell on behalf of Under Secretary of Agriculture Richard Crowder. The letter informed Congressman Huckaby that the DCP Farms case was under administrative review and assured him that "the Department of Agriculture will take a very aggressive position in dealing with this case." The letter did not suggest that the USDA was committed to a specific outcome. In fact, the Secretary's letter indicates a likelihood that DCP Farms' organization would be allowed under an equitable reorganization rule allowing farmers to reorganize their holdings to prevent a reduction in payments.

In April 1990, the Deputy Administrator notified the Mississippi ASCS office that the initial determination on DCP Farms for 1990 would be made at the national level along with the agency's initial determination of DCP Farms' eligibility under the 1989 plan. On June 1, 1990, the Deputy Administrator issued three letter opinions concluding that DCP Farms had adopted schemes or devices to evade the payment limitation provisions and therefore was ineligible to receive any subsidy payments for the 1989, 1990, or 1991 crop years.

DCP Farms appealed from the initial determination and requested a hearing, which was set for December 12, 1990.

Before the hearing, however, DCP Farms obtained documents disclosing the USDA meeting with congressional staffers and the letter from Chairman Huckaby. DCP Farms petitioned the Deputy Administrator to disqualify all employees and officials of the national office from further involvement in the administrative proceedings. The petition was denied.

On December 12, 1990, DCP Farms sued for declaratory and injunctive relief alleging that improper congressional interference denied them due process and that USDA's conduct was arbitrary, capricious and an abuse of discretion under the Administrative Procedure Act. The district court granted DCP Farms' request for permanent injunctive relief. The USDA appeals.

II.

DCP Farms' due process claim is based upon this court's decision in *Pillsbury Company v. Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966). While Pillsbury's case was pending before the FTC, the Subcommittee on Antitrust and Monopoly of the Senate Judiciary committee held hearings at which several members of the Commission and its staff appeared, including the author of the Commission's final opinion. The committee members questioned the FTC members at length about their reasoning and were critical of an earlier FTC ruling in the case. *Id.* at 964. The Federal Trade Commission eventually found that Pillsbury had violated § 7 of the Clayton Act.

The *Pillsbury* court held:

> when an investigation "focuses directly and substantially upon the mental decisional processes of a Commission *in a case which is pending before it*, Congress is no longer intervening in the agency's *legislative* function, but rather, in its *judicial* function. At this latter point, we become concerned with the right of private litigants to a fair trial and, equally

> important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences."

354 F.2d at 964 (emphasis in original). *Pillsbury* has been interpreted to invalidate adjudicative agency decisions whenever congressional contact with an agency creates the mere appearance of bias or pressure. *D.C. Federation of Civil Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971).The district court here relied on *Pillsbury* to conclude that Congressman Huckaby's letter to the USDA invalidated the agency's administrative determination by creating an appearance of bias or pressure. The district court held that Chairman Huckaby "exerted impermissible influence upon officials at the national level of the Department of Agriculture in an effort to dictate the outcome of those proceedings."

We must disagree with the district court's determination that *Pillsbury* governs this case. *Pillsbury* holds that the appearance of bias caused by congressional interference violates the due process rights of parties involved in *judicial* or *quasi-judicial* agency proceedings. 354 F.2d at 964. *See D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1972), (declining to apply *Pillsbury* standard to congressional interference where the Secretary's action was neither judicial nor quasi-judicial). *Pillsbury* was a case pending before a quasi-judicial body which would render the agency's final decision. In contrast, the contact here occurred well before any proceeding which could be considered judicial or quasi-judicial. This case would not have reached the stage when it could fairly be called adjudicative or quasi-judicial until the hearing which was scheduled for December 1990. There was no hearing on the merits of DCP Farms' application for farm subsidy payments because DCP Farms abandoned the administrative process for this litigation.

In short, the congressional communication here was not aimed at the decision-making process of any quasi-judicial body. Congressman Huckaby was concerned about the administration of a congressionally created program. The dispute between USDA and DCP Farms was part of a larger policy debate. Applying *Pillsbury*'s stringent "mere appearance of bias" standard at this juncture of administrative process would erect no small barrier to Congressional oversight. It reflects an insular view of these administrative processes for which we find no warrant. We are unwilling to so dramatically restrict communications between Congress and the executive agencies over policy issues. Appearance of bias is not the standard.

III.

Actual bias is ordinarily required to invalidate decisions by federal agencies. *See Dirt, Inc. v. Mobile County Commission*, 739 F.2d 1562 (11th Cir. 1984), ("Although such an appearance of bias is clearly present in this case, the standards governing administrative proceedings are far more relaxed than those controlling judicial proceedings."). An administrative decision will be overturned only when the hearing officers' mind is irrevocably closed or there was an actual bias. *United States v. Batson*, 782 F.2d 1307, 1315 (5th Cir. 1986). *See also FTC v. Cement Institute*, 333 U.S. 683 (1948).

We agree with the D.C. Circuit's conclusion in *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983) that the proper standard for evaluating congressional interference with non-judicial decisions of administrative agencies is whether the communication actually influenced the agency's decision. More specifically, the test is "whether 'extraneous factors intruded into the calculus of consideration' of the individual decisionmaker." *Id.* at 170, quoting *D.C. Federation*, 459 F.2d at 1246.

This focus on the intrusion of improper extraneous factors into the agency's decision-making process recognizes the political reality that "members of Congress are requested to, and do in fact, intrude in varying degrees, in administrative proceedings." *S.E.C. v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 126 (3d Cir. 1981) (en banc). It would be unrealistic to require that agencies turn a deaf ear to comments from members of Congress. The agency's duty, so long as it is not acting in its quasi-judicial capacity, is simply to "give congressional comments only as much deference as they deserve on the merits." *Id.*

We are cautious in reading extraneous factors too broadly, lest they impair agency flexibility in dealing with Congress. In particular, an agency's patient audience to a member of Congress will not by itself constitute the injection of an extraneous factor. Nor would a simple plea for more effective enforcement of law be the injection of an improper factor. A truly extraneous factor must take into account "considerations that Congress could not have intended to make relevant." *D.C. Federation*, 459 F.2d at 1247.

Congressional "interference" and "political pressure" are loaded terms. We need not attempt a portrait of all their sinister possibilities, even if we were able to do so. We can make plain that the force of logic and ideas is not our concern. They carry their own force and exert their own pressure. In this practical sense they are not extraneous. That a congressman expresses the view that the law ought not sanction the use of fifty-one irrevocable trusts to gain $1.4 million in subsidies is not impermissible political "pressure." It certainly injects no extraneous factor. We find no due process right in these preliminary efforts to persuade the government to grant farm subsidies sufficient to exclude the political tugs of the different branches of government, and we see nothing more here. We reject the holding of the district court that DCP Farms could ignore the administrative

procedure yet available to it and turn to the consequence of this bypass of remedies.

IV.

The Administrative Procedure Act provides for judicial review of agency action only where it is "made reviewable by statute" or is "final agency action." 5 U.S.C. § 704. The deputy administrator's initial determination of eligibility for farm subsidy payments is not made reviewable by statute, nor is it the USDA's final action on DCP Farms application. We review the district court's ruling concerning exhaustion of administrative remedies for abuse of discretion. *Girard v. Klopfenstein*, 930 F.2d 738, 741 (9th Cir. 1991).

The exhaustion requirement is not absolute, however, and this court has recognized exceptions. The district court apparently relied upon two of these exceptions to conclude that immediate judicial review of the agency's decision was appropriate. We conclude that as a matter of law neither exception applies to the facts of this case. The exceptions to the requirement that administrative remedies be exhausted apply only in "extraordinary circumstances." *Central States S.E. and S.W. Areas Pension Fund v. T.I.M.E.-D.C., Inc.*, 826 F.2d 320, 329 (5th Cir. 1987). The first is when "plaintiff contends that the administrative system itself is unlawful or unconstitutional." *Patsy v. Florida Int'l University*, 634 F.2d 900, 904 (5th Cir. 1981). This exception is inapplicable because the challenge here is not to provisions of the administrative process, but to its alleged subversion.

The second exception to the exhaustion requirement relied upon by the district court is when the plaintiff demonstrates that "it would be futile to comply with the administrative procedures because it is clear that the claim will be rejected." *Patsy*, 634 F.2d at 904. We are convinced that DCP Farms has failed as a

matter of law to produce evidence sufficient to support a finding of futility.

The district court relies upon two facts to support its conclusion that the USDA process would be futile because the claim would clearly be rejected. First, the district court cites the fact that Don Lloyd, the ASCS officer appointed to conduct the appellate hearing, had reviewed the letter USDA sent in response to Congressman Huckaby's letter. Second, the district court relies upon the USDA's summary rejection of DCP Farms' petition to recuse the entire national level from consideration of their case. A summary rejection was justified, however, by the unreasonably broad nature of the requested relief. It does not convince us that the USDA would have unreasonably refused a request for a different hearing officer had DCP Farms made such a request. In any event, evidence that a hearing officer read a letter involving this case is weak evidence that pursuing administrative appeals would have been futile. We recognize DCP Farms' concern that its appeal would have been heard by an officer it considered tainted by knowledge of Congressman Huckaby's letter. Nonetheless, these two pieces of evidence, without more, do not support a conclusion that pursuit of the USDA appeals process would be futile.

The appropriate forum for resolving this dispute is an appeal from a final USDA decision. The relief that DCP Farms sought here is exceptional. The federal courts are asked to enjoin an administrative agency from proceeding through its internal review process to reach a final agency decision. We decline to intrude into the USDA's administrative process where the plaintiff has not demonstrated a valid reason to be excused from exhausting its administrative remedies. To the extent that DCP Farms believes that extraneous factors were considered in the USDA's initial determination, it may make that argument in its appeal of the Deputy Administrator's decision.

We conclude that the district court erred in granting DCP Farms' request for injunctive relief. Accordingly, we REVERSE and REMAND with instructions to dismiss.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1384

DCP FARMS, et al.,
Plaintiffs-Appellees,

versus

CLAYTON YEUTTER, Secretary of Agriculture and U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL STABILIZATION & CONSERVATION SERVICE,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Mississippi

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 3-23-92, 5 Cir., 198_, _____F.2d_____)
(April 22, 1992)

Before REAVLEY, HIGGENBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge

in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
Patrick E. Higgenbotham
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

No. DC90-194-B-O

DCP FARMS, et al.,

Plaintiffs,

v.

CLAYTON YEUTTER, Secretary, UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,

Defendants.

MEMORANDUM OPINION

This cause comes before the court on the motion of the plaintiffs for declaratory and injunctive relief and the motion of Commodity Credit Corporation for intervention. The court held an evidentiary hearing on December 20, 1990, which the parties agreed to treat as a trial on the merits. After due consideration of the pleadings, the evidence, proposed findings of facts and conclusions of law, and the pre and post hearing memoranda of law, the court is prepared to rule.

USDA PROCEDURE

The United States Department of Agriculture (USDA) and the Agricultural Stabilization and Conservation Service (ASCS) administer the annual federal farm commodity programs pursuant to authority delegated to it by the Secretary of Agriculture. 5 U.S.C. § 301; 16 U.S.C. § 509h(b).

The ASCS has a three-tiered organizational and adjudicative structure, with offices at the county, state and national levels. The county committee (COC), assisted by the county executive director (CED), is responsible for implementing the ASCS administered programs in a particular county. 16 U.S.C. § 590h(b); 7 C.F.R. § 7.21(a). The county committee makes the initial determination regarding a producer's eligibility for payments under the various federal farm programs. If a determination is made that adversely affects a producer, the producer may seek reconsideration of that decision by the county committee. 7 C.F.R. § 780.3. The request for reconsideration begins the ASCS administrative appellate process.

A producer who is not satisfied with the county committee's reconsideration may obtain a review by the state committee (STC). 7 C.F.R. § 780.5. The STC is comprised of three to five persons, each of whom is appointed by the Secretary of Agriculture. 7 C.F.R. § 7.4.

Finally, appeals of that decision are taken to the Office of the Deputy Administrator for State and County Operations (DASCO), which conducts an informal hearing.

FACTS

On April 6, 1989, the Tunica County, Mississippi COC approved the 1989 farm operating plans of DCP Farms and Flowers and Parker Farms, and on April 11, 1989 sent letters to those producers notifying them of approval. Subsequently, on April 14, 1989, the Coahoma County, Mississippi COC approved the 1989 farm operating plan of Flowers Farms.

On December 6, 1990, shortly after a meeting on Capitol Hill between USDA officials and Congressional staffers regarding the organization of the plaintiff's 1989 farming operation, Representative Jerry Huckaby, Chairman of the Subcommittee on Cotton, Rice, and Sugar, of the House Committee on Agriculture, wrote to Secretary Yeutter specifically regarding the

plaintiffs' eligibility for federal farm program benefits. Chairman Huckaby's letter in pertinent part stated:

> As the principal sponsor of the legislation which established the new payment eligibility requirements, included in the Omnibus Budget Reconciliation Act of 1987 (P.L. 100-203), I feel strongly that the aforementioned operation violates both the spirit and letter of the law. It was clearly not the intent of Congress that such operations would qualify for such vast sums; if this operation does receive the reported 1.4 million dollars, it will only happen because USDA has failed to implement and enforce the law as intended by Congress.

Chairman Huckaby additionally stated that the plaintiffs' farm operating plans were "obviously designed to circumvent the minimal beneficial interest provision." Huckaby admonished Secretary Yeutter that "[i]f the Department is unable to correct this situation, it is my intention to enact legislation making all trusts and estates ineligible for payments, beginning retroactively with the 1989 crop year."

Finally, he strongly urged the Secretary to adopt the conclusion that the reorganization of the plaintiffs' farming operations was a scheme or device by stating:

> [The reorganization was] clearly designed and carried out to evade the law applicable to payment eligibility.... I am sure that the individuals involved in this operation were aware of the intent of the law. It seems clear that this reorganization was adopted as a device to avoid the payment eligibility law, and I strongly urge you to invoke the scheme or device provision to enforce the payment eligibility law. This provision of the law was adopted for this purpose.

A February, 1990 letter written by William Penn for the signature of Under Secretary for International Affairs and Commodity Programs, Richard Crowder, but signed by Deputy Under Secretary John Campbell, responded to Chairman Huckaby's letter of December 6, 1989. The letter notes that USDA shares Chairman Huckaby's concern, and specifically states as follows:

> As we discussed in our meeting with you, the specific case from the Office of Inspector General audit is under review by the Deputy Administrator for State and County Operations in the Agricultural Stabilization and Conservation Service and I assure you the Department of Agriculture will take a very aggressive position in dealing with this case.

In June 1, 1990 letters signed by William Penn, DASCO issued decisions overturning the Tunica County and Coahoma County ASC Committees' decisions approving the plaintiffs' 1989 farm operating plans. Additionally, those letters took the unprecedented action of rendering the initial determinations denying the plaintiffs' request for program benefits for the 1990 crop year. Furthermore, those decisions ruled the plaintiffs ineligible for any federal farm program benefits for 1989, 1990, and 1991 on the ground that the plaintiffs had participated in a "scheme or device for the 1989 and 1990 crop years which was designed to evade the payment limitation regulations of 7 C.F.R. Part 1497."

DASCO informed the plaintiffs that appeal of this decision should be directly to the national level. The plaintiffs appealed this administrative determination accordingly and filed a Freedom of Information Act (FOIA) request with the USDA to obtain documents relevant to these proceedings on July 5, 1990. On September 25, 1990, the plaintiffs received a redacted version of a memorandum dated April 30, 1990 from William Penn, Assistant DASCO, to Keith Bjerke, ASCS Administrator. On

November 21, 1990, the plaintiffs initiated proceedings in this court challenging USDA's refusal to release the entire document pursuant to the FOIA. On December 4, 1990, by agreement of the parties, this court entered an order directing that the unredacted version be made available to the plaintiffs.

The unredacted memorandum revealed that at the time the plaintiffs' 1989 farm operating plans were under review by DASCO, Penn and Campbell "met with several staffers, including Huckaby's" on Capitol Hill to discuss issues relating to eligibility for payments under the federal farm programs. Referring to the plaintiffs' plan, the memorandum states that "John (Campbell) and the staffers, as well as myself, were very concerned about this type of organization." Furthermore it stated, "the Under Secretary's office did not want a determination on Mr. Flowers' operation made anyplace except in the office of DASCO. The State office was so informed."

Based upon this evidence, on December 11, 1990, the plaintiffs filed a Petition to Disqualify the national level of USDA from further participation in any administrative proceedings. They further requested that the June 1, 1990 DASCO decisions in this matter be declared invalid; the April 6, 1989 decision of the Tunica County, Mississippi ASC Committee and the April 14, 1989 decision of the Coahoma County, Mississippi ASC Committee be reinstated; and the plaintiffs' 1990 farm operating plans either be deemed approved as filed or be remanded to the Tunica County and Coahoma County ASC Committees for determination, with any administrative appeals therefrom limited solely to the Mississippi State ASC Committee.

Approximately two hours after the Petition was filed, the defendants denied the Petition. The plaintiffs were notified that the hearing would be held as scheduled and that any evidence the plaintiffs wished to submit for the record be submitted at that time or not at all. This hearing was postponed on December 12,

1990 when the plaintiffs filed this action for a preliminary injunction.

LAW

The standard for issuance of preliminary injunctive relief requires the party seeking relief to prove the following:

a) a substantial likelihood of success on the merits;

b) a substantial threat that irreparable injury will result if the injunction is not granted;

c) that the threatened injury outweighs the threatened harm to the non-movant; and

d) that granting the injunction is not adverse to the public interest.

DFW Metro Line Services v. S.W. Bell Tel. Co., 901 F.2d 1267 (5th Cir. 1990); *Concerned Women for America Education & Legal Defense Foundation, Inc. v. Lafayette Cty. & Oxford Pub. Library*, 699 F.Supp. 95 (N.D. Miss. 1988), *aff'd* 883 F.2d 32 (5th Cir. 1989).

CONCLUSION

The plaintiffs argue that the defendants' June 1, 1990 decisions holding the plaintiffs ineligible for any federal farm program benefits for the 1989, 1990, and 1991 crop years are invalid under the due process clause of the Fifth Amendment to the U.S. Constitution because those decisions were impermissibly obtained by Congressional interference; such interference in this matter violates the plaintiffs' due process rights to a fair and impartial hearing at the national level of the USDA, including DASCO, of the plaintiffs' appeal of the June 1, 1990 decisions by DASCO; defendants' conduct has been arbitrary and capricious, an abuse of discretion, and contrary to law, causing the plaintiffs irreparable injury if injunctive relief is not granted. The defendants counter stating that the court should allow Commodity Credit Corporation, as a real party in interest,

to intervene; should dismiss the USDA and ASCS; should transfer this case to Claims Court; that this court lacks subject matter jurisdiction; and that no irreparable injury would occur.

a. Intervention of Commodity Credit Corporation

Commodity Credit Corporation (CCC) is an "agency and instrumentality of the United States, within the Department of Agriculture, subject to the general supervision and direction of the Secretary of Agriculture." 15 U.S.C. § 174. The CCC has moved to intervene in this action as a real party in interest. It argues that the relief requested by the plaintiffs runs against the CCC.

The plaintiffs contracted to enter into one of the price support and production adjustment programs for rice, cotton, wheat and feed grains. These programs are funded by the CCC; hence, it is argued that the CCC is an interested party. However, the CCC admits that the actual day-to-day operation of administering domestic CCC programs are generally performed by the ASCS.

The CCC and the defendants further note that 15 U.S.C. § 714b(c) bars attachment, injunction, garnishment, or other similar process against the CCC. This is apparently the reason why the defendants and the CCC so adamantly insist upon the intervention of the CCC and the dismissal of the ASCS and USDA.

On point with the facts in this particular issue, the United States District Court of Arizona in *Justice v. Lyng*, 716 F.Supp. 1567 (D.Ariz. 1988), ruled that the CCC, as it is not involved in the administrative conduct that led to the action, is not an interested party. The plaintiffs in *Justice* did not name the CCC as a defendant in that particular case. The defendants in *Justice*, as is argued in this case, pushed for CCC intervention as the real party in interest, so that they could in turn argue the above mentioned 15 U.S.C. § 714b(c). That case, as this one, involved

declaratory relief in connection with the administration of federal farms programs. In so ruling, the court stated:

> If this court were to find that this action ran against the CCC and that declaratory judgments were equivalent in injunctive relief, the Secretary would be, in essence, immune from judicial review of administrative decisions concerning the Agriculture Act. That would be a nonsensical result.

Id. at 1569.

Following that same line of reasoning the court is of the opinion that the action is not against the CCC, but rather the Secretary of Agriculture, the USDA, and the ASCS, as the CCC was not involved in the legislative and administrative conduct which is the cause of this litigation. To find otherwise would be a grant of immunity to the USDA and its administration in matters involving injunctive relief merely because it is funded through the CCC. That, this court likewise finds "nonsensical." The court, therefore, finds the CCC's motion to intervene as a real party in interest to be not well taken. In doing so, the court need not reach the argument of whether injunctive relief may lie against the CCC.

b. Congressional interference.

Agency action is invalid if based, even in part, on pressures emanating from Congressional sources. *Pillsbury Co. v. Federal Trade Com*, 354 F.2d 952 (5th Cir. 1966). And, where agency adjudicative proceedings are involved, impermissive influence may be found where the mere appearance of bias or pressure can be shown. *Id.*

In the instant case, the court is of the opinion that the letter from Congressman Huckaby, a member of the House Agriculture Committee and principal author of the payment limitation provisions administered by the defendants, along with his key staff aide, exerted impermissible influence upon officials at the

national level of the Department of Agriculture in an effort to dictate the outcome of those proceedings.

Additional evidence exists which makes this finding abundantly clear. The above mentioned letter urging that the plaintiffs be denied eligibility to receive federal farm program benefits was read and responded to by William Penn of DASCO. Penn was, *inter alia*, the officer in charge of reviewing the decisions of the Tunica County and Coahoma County ASC Committees' approval of the plaintiffs' plan and was therefore in a position to implement the Congressman's desires. Penn's response assured Congressman Huckaby that the USDA "will take a very aggressive position in dealing with the [plaintiffs'] case."

The defendants' novel argument that Congressman Huckaby was merely urging the enforcement of the law is simply unconvincing. The court therefore is of the opinion that there has been a sufficient showing of the mere appearance of pressure or bias.

c. Subject matter jurisdiction

(1) Tucker Act

The defendants argue that this court lacks subject matter jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1346(a)(2). In pertinent part, this section states that jurisdiction over contract actions against the United States exceeding $10,000 must be brought in the United States Court of Claims. The Tucker Act applies only to claims for monetary damages. *Northside Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir.), *cert. denied*, 474 U.S. 931 (1985).

The review of claims in district court under the Tucker Act are, however, not precluded or limited when the relief sought is other than money damages, or where nonmonetary relief may form the basis for a future money judgment. *Laguna Hermosa*

Corp. v. Martin, 643 F.2d 1376, 1379 (9th Cir.1981). The Court of Claims is limited, for purposes of the instant case, for "actual, presently due money damages from the United States." *United States v. King*, 395 U.S. 1, 3, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52 (1976).

The United States Supreme Court recently clarified the term "money damages" in *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988). Quoting an opinion written for the Court of Appeals for the District of Columbia Circuit in *Maryland Dept. of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441 (D.C. Cir.1985), the Court stated:

> We turn first to the question whether the relief Maryland seeks is equivalent to money damages. Maryland asked the district court for a declaratory judgment and for injunctive relief 'enjoining defendants from reducing funds otherwise due to plaintiffs, or imposing any sanction on such funds for alleged Title XX violation.'....We begin with the ordinary meaning of the words Congress employed. The term 'money damages,' 5 U.S.C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'....The fact that in the present case it is money rather than in-kind benefits that pass from the federal government to the state cannot transform the nature of the relief sought-specific relief, not relief in the form of damages.

Bowen, 487 U.S. at 895.

In the instant case the plaintiffs move this court for injunctive relief, *inter alia*, to enjoin the USDA and its subdivisions from further administrative hearings regarding eligibility for the

federal farms programs and to reinstate earlier COC decisions. While an award of this nature may serve as a basis for monetary relief, it is not a substitute remedy at all but an attempt to give the plaintiff the very thing to which he was entitled in the first place and is not "money damages" as the term is contemplated and used in the Tucker Act. The defendants' argument is therefore not well taken.

(2) 5 U.S.C. § 704, "Exhaustion" requirement.

The defendants argue that the court should not accept jurisdiction over this matter until all administrative remedies have been exhausted. The exhaustion of the administrative remedies requirement is housed within the Administrative Procedure Act, 5 U.S.C. § 704. In pertinent part, it provides:

> Every agency action made reviewable by statute and final agency action for which there is no other adequate remedy in any court are subject to judicial review.

Where it would be futile to comply with the administrative procedures or where the administrative process is unlawful or unconstitutional in form or application, the Fifth Circuit Court of Appeals, in the case of *Patsy v. Florida Int'l Univ.*, 634 F.2d 900 (5th Cir. 1981), *rev'd on other grounds*, 457 U.S. 496 (1982), has determined that the exhaustion requirement is met. Furthermore, "administrative remedies need not be exhausted when the constitutionality of the agency action is in question." *Philadelphia v. SEC*, 434 F.Supp. 281, 286 (E.D.Pa. 1977).

The record clearly shows that the national level of the USDA took unprecedented action when it instructed the Tunica County and Coahoma County ASC Committees not to make an initial determination with respect to the plaintiffs' 1990 plans to receive federal farm program benefits. Furthermore, it overturned the decisions of the Tunica County and Coahoma County ASC Committees' approval of the plaintiffs' 1989 farm operat-

ing plans. It likewise declared the plaintiffs to be ineligible to receive any federal farm program benefits to the 1989, 1990, and 1991 crop years on the ground that the plaintiffs had engaged in a scheme or device to evade the payment limitation rules.

As evidence of futility, Don Lloyd, the ASCS officer appointed to conduct the appellate hearing and to make recommendations to DASCO regarding the plaintiffs' administrative appeal, had reviewed Penn's response to the December 6, 1989 letter from Congressman Huckaby to Secretary Yeutter, noted above, which stated that "the USDA will take a very aggressive position in dealing with this case."

These facts lead the court to the conclusion that not only do the administrative proceedings have a mere appearance of having been influenced by Congressional pressures, they have in fact been so impermissively tainted by Congressional interference that it renders further administrative procedures futile. Furthermore, under these circumstances to require the plaintiffs to take their case to the national level of the USDA would violate their constitutional right to a fair and impartial hearing. The court therefore finds the defendants' argument regarding 5 U.S.C. § 704 to be not well taken and the "exhaustion" requirement met, thereby bestowing jurisdiction of this matter upon this court.

d. Review.

5 U.S.C. § 706 provides that a reviewing court, in order to set aside and hold agency actions unlawful, must find such actions to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

The defendants have failed to comply with their own procedures regarding the adjudication of eligibility for federal farm programs benefits. The defendants' Handbook at 1-PL provides that *all initial determinations*, as well as determina-

tions regarding whether a farmer has adopted a scheme or device to evade the payment limitation rules, are to be made at the county level (emphasis added). The evidence clearly shows that the national level of the USDA, in an unprecedented action, ordered the county ASCS offices to refrain from making the initial determinations regarding the plaintiffs' 1990 farm plans, then made the initial determinations itself and refused to allow the state ASCS office to review the counties' decisions.

As evidence of arbitrary and capricious behavior, the record reflects that the USDA officials at the national level ordered the county ASCS offices to refrain from any communication with the plaintiffs regarding their 1989 and 1990 farm operating plans, in contrast to other situations in which such communications were permitted. Furthermore, the USDA officials who were responsible for the initial determination denying the plaintiffs' eligibility for program benefits, including the administrative appeals hearing officer, were appointed to consider the plaintiffs' petition to disqualify the national level of the USDA from further participation in proceedings regarding this matter. Not surprisingly, the petition was denied within two hours of its filing. If a court of law engaged in such actions in regard to a case before it, the judge would be deservedly admonished by an appellate court.

By engaging in such aforementioned behavior, the defendants have violated the Fifth Amendment due process clause guaranteeing the right to a fair and impartial hearing. In doing so, the defendants have acted contrary to law.

For the aforementioned reasons, the court finds the defendants to have acted arbitrarily, capriciously, and contrary to law, and to have abused their discretion, all in violation of § 706 of the Administrative Procedure Act.

e. Holding

The court finds that there is a substantial likelihood of the plaintiffs succeeding on the merits of this case. This is made evident in Chairman Huckaby's letter to the Secretary of Agriculture in which he stated:

> During the preparation of the payment eligibility legislation, staff of the Members involved had numerous meetings over several months with representatives of the Department to ensure that this legislation was suitable to both the Department and the Congress and closed all possible loopholes. *In the cases of estates and irrevocable trusts, the Department strongly urged us not to codify the treatment of these types of entities but to allow the Department to determine the manner in which these entities would be handled.*

(Emphasis added.) The court has no evidence before it, other than the statements by Chairman Huckaby involving spirit and intent, that suggests the creation of irrevocable trusts is contrary to the farm program eligibility regulations.

Unless the injunctive relief sought is granted, the plaintiffs will be participants in an adjudicative appellate process which the court finds to be impermissibly tainted by Congressional interference. Because of such interference, the plaintiffs' due process rights to a fair and impartial hearing have been compromised. In *Deerfield Medical Center v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981), the Fifth Circuit noted that a violation of constitutional rights constitutes an irreparable injury. As such is the case instantly, the court finds the requisite irreparable injury present.

Furthermore the court is of the opinion that the threatened injury outweighs the threatened harm to the non-movant and that granting the injunction is not adverse to the public interest.

Agency action is invalid if based, even in part, on pressures emanating from Congressional sources. *Pillsbury Co. v. Federal Trade Com.*, 354 F.2d 952 (5th Cir. 1966).

As the court has already found a sufficient showing of impermissive Congressional influence or pressure to warrant the imposition of a preliminary injunction, the court is of the opinion that the plaintiffs' motion for preliminary injunction requesting certain declaratory and injunctive relief is well taken and should be granted.

An order in accordance with this memorandum opinion will this day issue.

THIS the 4th day of February, 1991.

/s/_____
Neal B. Biggers, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

NO. DC90-194-B-O

DCP FARMS, ET AL.,

Plaintiffs,

V.

CLAYTON YEUTTER, Secretary, UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,

Defendants.

ORDER

In accordance with the memorandum opinion this day issued it is hereby ORDERED that:

1. The motion of Commodity Credit Corporation to intervene is DENIED;

2. The defendants' June 1, 1990 decisions holding the plaintiffs ineligible for any federal farm program benefits for the 1989, 1990 and 1991 crop years are OVERRULED AND VACATED;

3. The defendants are hereby permanently ENJOINED from allowing the national level of the USDA, including DASCO, to participate further in any determinations or administrative appeals concerning the plaintiffs' eligibility for the federal farm program benefits for the 1989, 1990, and 1991 crop years;

4. The April 6, 1989 decision of the Tunica County, Mississippi ASC Committee and the April 14, 1989 decision of the Coahoma County, Mississippi ASC Committee approving the 1989 farm operating plans of the plaintiffs DCP Farms, Flowers Farms, and Flowers and Parker Farms are REINSTATED;

5. The defendants shall forthwith either approve as filed the 1990 farm operating plans of the plaintiffs DCP Farms, Increase Plantation, Matagorda Plantation, Omega Plantation, and Flowers and Parker Farms or remand those farm operating plans to the Tunica County and Coahoma County ASC Committees, as appropriate, for initial determinations and shall provide that any administrative appeals from such initial determination be limited solely to the Mississippi State ASC Committee;

6. The plaintiffs are awarded their costs of suit; and

7. The clerk of this court is DIRECTED to enter final judgment in favor of plaintiffs, as provided herein, forthwith.

SO ORDERED AND ADJUDGED this, the 4th day of February, 1991.

/s/_____
Neal B. Biggers, Jr.
United States District Judge

PART 780 — APPEAL REGULATIONS

Sec.

780.1 Basis, Purpose and applicability.

780.2 Definitions.

780.3 Request for reconsideration.

780.4 Appeal to the State committee.

780.5 Appeal to Deputy Administrator.

780.6 Time limitations for filing requests for reconsideration or appeals.

780.7 Form of request for reconsideration or appeal.

780.8 Nature of informal hearing.

780.9 Determination.

780.10 Reopening of hearing.

780.11 Requests for reconsideration and appeals requiring special handling.

780.12 Delegation of authority.

780.13 OMB — control numbers assigned pursuant to the Paperwork Reduction Act.

AUTHORITY: Secs. 4 and 5 of the Commodity Credit Corporation Charter Act, as amended, 62 Stat. 1070, as amended, 1072 (15 U.S.C. 714b and 714c); section 8 of the Soil Conservation and Domestic Allotment Act, as amended, 49 Stat. 1149 as amended (16 U.S.C.590h).

SOURCE: 53 FR 45074, Nov. 8, 1988, unless otherwise noted.

§ 780.1 Basis, purpose and applicability.

(a) The regulations set forth in this Part are applicable to all programs administered by the county and State Agricultural Stabilization and Conservation committees ("county committee" and "State committee," respectively) and the Deputy Administrator, State and County Operations ("Deputy Administrator") of the Agricultural Stabilization and Conservation Service ("ASCS"), except as otherwise may be provided in individual program requirements. These regulations prescribe the rules and procedure that must be followed by a person who seeks reconsideration or review of a determination made with respect to:

(1) Denial of participation in such a program;

(2) Compliance with program requirements;

(3) The making of payments or other program benefits to a person who is a participant in such a program; and

(4) The making of payments or other program benefits to a person who is not a participant in such a program.

(b) Reconsideration and review under this Part is limited to only individual determinations made with respect to those persons meeting the requirements of paragraph (a) of this section. Accordingly, there is no review under this Part with respect to general program requirements that are applicable to all program participants.

§ 780.2 Definitions.

(a) "Participant" means any person whose right to participate in, or receive payments or other benefits in accordance with, any of the programs to which these regulations apply who is affected by a determination of the county committee, State committee, or the Deputy Administrator.

(b) "Reviewing authority" means the county committee, State committee, or the Deputy Administrator, as is appropriate.

(c) "State committee" means in Puerto Rico and the Virgin Islands, insofar as is practical, the Director of the Caribbean Area ASCS office.

§ 780.3 Request for reconsideration.

Any participant who believes that a proper determination has not been made in accordance with applicable program regulations or that all of the facts were not considered with respect to any such determination initially made by the county committee, State committee, or Deputy Administrator, may obtain a reconsideration of such determination and an informal hearing therewith by filing a request for reconsideration with the reviewing authority which initially made such determination.

780.4 Appeal to the State committee.

Any participant who believes that a proper determination has not been made by the county committee upon its reconsideration of an initial determination may obtain a review of such determination by the State committee and an informal hearing in connection therewith by filing an appeal with the State committee.

780.5 Appeal to Deputy Administrator.

Except as provided in § 780.11, any participant who believes that a proper determination has not been made by the State committee may obtain a review by the Deputy Administrator of such determination and an informal hearing in connection therewith by filing an appeal with the Deputy Administrator.

§ 780.6 Time limitations for filing requests for reconsideration or appeals.

(a) A request for reconsideration or appeal by a participant from any determination shall be filed within 15 days after written notice of the determination is mailed to or otherwise made available to the participant. A request for reconsideration or appeal shall be considered to have been "filed" when personally delivered to the appropriate office or when postmarked.

(b) Whenever the final date for filing a request for reconsideration or appeal prescribed in paragraph (a) of this section falls on a Saturday, Sunday, legal holiday, or other day on which the appropriate office is not open for the transaction of business during normal working hours, the time for filing shall be extended to the close of business on the next working day.

(c) A request for reconsideration or appeal may be accepted and acted upon even though it is not filed within the time prescribed in paragraph (a) or (b) of this section if, in the judgment of the reviewing authority with whom such request is made, the circumstances warrant such action.

780.7 Form of request for reconsideration or appeal.

Each request for reconsideration or appeal shall be in writing and signed by the participant or by an authorized representative of the participant. Each request for reconsideration or appeal shall be supported by a written statement of facts, which may be submitted with or as a part of the request for reconsideration or appeal, or at any time prior to the hearing. The participant may request an informal hearing or may request a determination to be made by the reviewing authority without a hearing on the basis of the written statement submitted and other information available to the reviewing authority. If a request for an informal hearing is not made by the participant, the reviewing authority shall make its determination on the basis of the

material that was made available in making the prior determination and the material submitted by the participant.

§ 780.8 Nature of informal hearing.

(a) The hearing shall be held at the time and place designated by the reviewing authority.

(b) The hearing shall be conducted by the reviewing authority, or a representative of the reviewing authority in the manner deemed most likely to obtain the facts relevant to the matter in issue. The participant shall be advised of the issues involved. The reviewing authority may confine the presentation of facts and evidence to pertinent matters and may exclude irrelevant, immaterial, or unduly repetitious evidence, information, or questions.

(c) The participant, or an authorized representative of the participant, shall be given a full opportunity to present facts and information relevant to the matter in issue and may present oral or documentary evidence. At its discretion, the reviewing authority may request or permit persons other than those appearing on behalf of the participant to present information or evidence at such hearing and, in such event, may permit the participant to question such persons.

(d) The reviewing authority shall have prepared a written record containing a clear, concise statement of the facts as asserted by the participant and material facts found by the reviewing authority. The names of interested persons appearing at the hearing shall be included. A verbatim transcript may be made if:

(1) The participant requests at a reasonable period prior to the time the hearing begins that the reviewing authority provide for such a transcript and agrees to pay the expense thereof, or

(2) The reviewing authority determines that such a transcript is appropriate.

(e) If, at the time scheduled for the hearing, the participant is absent and no appearance is made on behalf of the participant, the reviewing authority shall, after a reasonable time conclude the hearing, or may, at its discretion, accept information and evidence submitted by other persons present at the hearing.

780.9 Determination.

(a) The reviewing authority prior to making a determination may request the producer or participant to produce additional evidence which it may deem relevant or may develop additional evidence from other sources. Upon reconsideration or review and within program authorities, the reviewing authority may affirm, modify, or reverse any determination made by it initially or made by a lower reviewing authority, or may remand the matter to a lower reviewing authority for such further consideration as is deemed appropriate. The producer or participant shall be notified in writing of the determination. The notification shall clearly set forth the basis for the determination. Each other person affected by the determination shall be notified in writing of the determination. Determinations made by the Deputy Administrator shall not be appealable by the producer or participant.

(b) When a producer requests copies of documents, information, or evidence upon which a determination is made or which will form the basis of the determination, copies of such documents, information or evidence shall be made available as provided in Part 798 of this chapter.

§ 780.10 Reopening of hearing.

The reviewing authority may, upon its own motion or upon request of the participant, reopen any hearing for any reason it deems appropriate unless the matter has been appealed to or considered by a higher reviewing authority.

§ 780.11 Requests for reconsideration and appeals requiring special handling.

Notwithstanding any other provision at this part, determinations:

(a) Made under a conservation program involving a finding or certification by a technician of the Soil Conservation Service or Forest Service, or determinations of a technical nature by any Federal agency, other than a determination made by ASCS, shall be binding on the reviewing authority, and

(b) Made by a State committee with respect to program payment yields or crop acreage bases are not appealable.

780.12 Delegation of authority.

Nothing contained in these regulations in this part shall preclude the Administrator, ASCS, or the Executive Vice President, Commodity Credit Corporation, or a designee from determining at any time any question arising under the programs to which the regulations in this part apply or from reversing or modifying any determination made a county or State committee or the Deputy Administrator.

§ 780.13 OMB — control numbers assigned pursuant to the Paperwork Reduction Act.

The information collection requirements contained in these regulations (7 CFR Part 780) have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35.

Supreme Court, U.S.
FILED
OCT 11 1992
OFFICE OF THE CLERK

(2)

No. 92-124

In the Supreme Court of the United States

OCTOBER TERM, 1992

DCP FARMS, ET AL., PETITIONERS

v.

SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

1. Whether communications from a Member of Congress to an agency concerning a matter, before an administrative hearing on the matter is scheduled, deprived petitioners of due process.

2. Whether petitioners' claim must be dismissed for failure to exhaust administrative remedies.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	20

TABLE OF AUTHORITIES

Cases:

American Pub. Gas Ass'n v. *Federal Power Comm'n*, 567 F.2d 1016 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978)	16
Bowen v. *City of New York*, 476 U.S. 467 (1986)	18
Brown v. *McGarr*, 774 F.2d 777 (7th Cir. 1985)	15
Cassim v. *Bowen*, 824 F.2d 791 (9th Cir. 1987)	18
FTC v. *Cement Institute*, 333 U.S. 683 (1948)	11, 12, 15
Gravel v. *United States*, 408 U.S. 606 (1972)	17
Gulf Oil Corp. v. *Federal Power Comm'n*, 563 F.2d 588 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978)	16
Hortonville Joint School Dist. No. 1 v. *Hortonville Educ. Ass'n*, 426 U.S. 482 (1976)	12
Marketing Assistance Program v. *Bergland*, 562 F.2d 1305 (D.C. Cir. 1977)	15
McCarthy v. *Madigan*, 112 S. Ct. 1081 (1992)	18, 19
Missouri v. *Bowen*, 813 F.2d 864 (8th Cir. 1987)	19
Montgomery v. *Rumsfeld*, 572 F.2d 250 (9th Cir. 1978)	19
Morris v. *City of Danville*, 744 F.2d 1041 (4th Cir. 1984)	15
Myrick v. *City of Dallas*, 810 F.2d 1382 (5th Cir. 1987)	12
Peter Kiewit Sons' Co. v. *United States Army Corps of Eng'rs*, 714 F.2d 163 (D.C. Cir. 1983)	16
Pillsbury Co. v. *FTC*, 354 F.2d 952 (5th Cir. 1966)	9, 13, 14
Power Auth. v. *FERC*, 743 F.2d 93 (2d Cir. 1984)	16

Cases—Continued: Page

SEC v. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118 (3d Cir. 1981) 17
United States v. *Batson*, 782 F.2d 1307 (5th Cir.), cert. denied, 477 U.S. 906 (1986) 12, 13, 15
United States v. *Florida E. Coast Ry.*, 410 U.S. 224 (1973) 15
United States v. *Morgan*, 313 U.S. 409 (1941) 11
Withrow v. *Larkin*, 421 U.S. 35 (1975) 11, 12

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
5 U.S.C. 557(d)(1)(E) 15
5 U.S.C. 704 19
5 U.S.C. 706 8
Agricultural Act of 1949, 7 U.S.C. 1421 *et seq.* 2
7 U.S.C. 1308(1) (1988 & Supp. III 1991) 2
7 U.S.C. 1308-1(a) (1988 & Supp. III 1991) 2
7 U.S.C. 1308-2 2
7 C.F.R.:
Section 7.4 3
Section 7.9 3
Section 7.21 3
Section 780.3 3
Section 780.5 (1991) 3
Section 780.8(c) (1991) 3
Section 1497.2(d) 4, 7
Section 1497.2(e) 3
Section 1497.3(b) 2
Section 1497.24(a) (1991) 3
Section 1497.27(a) (1991) 3

Miscellaneous:

133 Cong. Rec. (1987):
p. 3237 2
pp. 34,836-34,837 2
p. 34,842 2

Miscellaneous—Continued: Page

p. 34,844 2
p. 34,846 2

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-124

DCP FARMS, ET AL., PETITIONERS

v.

SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of court of appeals (Pet. App. 1a-11a) is reported at 957 F.2d 1183. The opinion of the district court (Pet. App. 1c-15c) is reported at 761 F. Supp. 1269.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1992. Petitioners filed a suggestion for rehearing en banc on April 6, 1992. Treating the suggestion for rehearing en banc as a petition for panel rehearing as well, the court of appeals denied rehearing on April 22, 1992. The petition for a writ of certiorari was filed on July 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Act of 1949, 7 U.S.C. 1421 *et seq.* (the Act), provides for the award of agricultural subsidies, under a program administered by the Agricultural Stabilization and Conservation Service (ASCS), pursuant to authority delegated by the Secretary of Agriculture. The Act imposes limits ranging from $50,000 to $250,000 on the annual subsidy that may be paid to any "person," as defined by the Secretary. 7 U.S.C. 1308(1) (1988 & Supp. III 1991); see also 7 C.F.R. 1497.3(b).

During 1986 and 1987, it became apparent that some farmers were circumventing the Act's payment limits. Among the devices used was the so-called "Mississippi Christmas Tree," in which farmers would subdivide and reorganize their farms into multiple legal entities to qualify for more than one subsidy. See 133 Cong. Rec. 34,836-34,837, 34,842, 34,844, 34,846 (1987); 133 Cong. Rec. 3237 (1987).

In an effort to correct those abuses, Congress amended the Act in 1987. Congress enacted a provision prohibiting any "person" who receives a subsidy from holding a substantial beneficial interest in more than two other farming entities that also receive subsidies. 7 U.S.C. 1308-1(a) (1988 & Supp. III 1991). That provision became known as the "three permitted entity" rule. The Act also provided the Secretary with an administrative enforcement mechanism. Any person who the Secretary determines "has adopted a scheme or device to evade, or that has the purpose of evading" the three permitted entity rule "shall be ineligible to receive farm program payments * * * applicable to the crop year for which such scheme or device was adopted and the succeeding crop year." 7 U.S.C. 1308-2. The Secretary's regulations define "scheme or device" to include, among

other things, the creation of "fictitious entities for the purpose of concealing the interest of a person in a farming operation." 7 C.F.R. 1497.24(a) (1991).

2. The ASCS employs a three-tier system to determine eligibility for and award subsidies. 7 C.F.R. 1497.27(a) (1991). Under the regulations, farmers submit their annual farm operating plans, which serve as applications for subsidies, to the county office of the ASCS for review by a county committee. 7 C.F.R. 1497.2(e). County committees are composed of local farmers elected by their peers. 7 C.F.R. 7.4, 7.9. County committees make initial determinations of eligibility, including the number of "persons" that comprise the farm at issue, and determine the amount of the subsidies to be granted. 7 C.F.R. 1497.2(e); see also 7 C.F.R. 7.21.

A farmer dissatisfied with the determination of his county committee may seek reconsideration of the committee's decision, and thereafter may appeal to the state committee (7 C.F.R. 780.3), which consists of farmers serving at the pleasure of the Secretary. 7 C.F.R. 7.4. If a farmer remains aggrieved, he may appeal the state committee's decision to the Deputy Administrator, to whom the Secretary has delegated final decisionmaking authority. 7 C.F.R. 780.5 (1991). At each stage of the process, the farmer is entitled to an "informal hearing," at which he is given "a full opportunity to present facts and information relevant to the matter in issue and may present oral or documentary evidence." 7 C.F.R. 780.8(c) (1991). Finally, the regulations make clear that, although initial decisionmaking authority has been delegated to the state and county committees, ultimate authority rests with the "Administrator, ASCS, or a designee," who are not precluded "from determining any question arising under [the program] or from re-

versing or modifying any determination made by a State or county committee" or the Deputy Administrator. 7 C.F.R. 1497.2(d).

3. a. Petitioners are joint ventures controlled primarily by members of the Flowers and Parker families, operating in Tunica and Coahoma Counties, Mississippi. RA 99-102.[1] After Congress adopted the three permitted entity rule, which became effective for the 1989 crop year, petitioners reorganized their operation.[2] Petitioners created 51 irrevocable trusts, and transferred interests in their sub-divided farms to those trusts. RA 62, 99-104. Although the income beneficiaries of the trusts were third parties or employees of petitioners, the grantor of each trust ordinarily was one of the members of either the Flowers or Parker families, and the remainder beneficiary of the trust was a different family member. RA 99-101.

On April 6, 1989, the Tunica County committee approved the 1989 operating plans of DCP Farms, which was found eligible for subsidies to ten "persons," and of the Flowers and Parker Farms, which were found eligible for subsidies to five "persons." RA 33-37. On April 14, 1989, the Coahoma County committee approved the 1989 operating plan for Flowers Farms, granting subsidies to 20 "persons." RA 40-41.

b. In September, 1989, the Department of Agriculture's Office of Inspector General issued an Audit Report regarding ASCS implementation of the three permitted entity rule. The Audit Report discussed

[1] "RA" refers to the Record on Appeal. "RT" refers to the reporter's transcript of proceedings in the district court.

[2] In 1988, petitioners received subsidies as 43 "persons," consisting of six individuals and 37 corporations. Gov't C.A. Br. 8.

petitioners' operation in detail.[3] RT 83, 91. The Inspector General noted that the trusts created by petitioners appeared to be flow-through entities created to avoid the three permitted entity rule. Shortly thereafter, the Deputy Administrator began his own investigation to respond to the Audit Report, as required by internal Department of Agriculture (Department) guidelines. RT 78-79, 84.

In November 1989, several officials from the Department, including Assistant Deputy Administrator William Penn, Deputy Under Secretary for International Affairs and Commodity Programs John Campbell, and Deputy Assistant General Counsel Ralph Linden, attended a meeting with several congressional staff members to discuss the effectiveness of the three permitted entity rule and possible solutions to the problems identified in the Audit Report. RT 80-82. Petitioners' operation was discussed at the meeting as an example of the sort of problems the Audit Report had identified. RT 83. None of the participants offered any opinion regarding petitioners' eligibility for subsidies. RT 83-84.

Shortly after the November meeting, Representative Huckaby, Chairman of the House Subcommittee on Cotton, Rice, and Sugar, wrote to the Secretary of Agriculture to express his concern over the findings outlined in the Audit Report. In particular, Representative Huckaby noted the example of petitioners' farms, which he described as "a new version of the now infamous 'Mississippi Christmas Tree,' updated to attempt to circumvent the new regulations

[3] The report did not identify petitioners by name, but it is undisputed that the Tunica County operation referred to in the Audit Report was that of petitioners.

designed to limit this type of operation." RA 49. Representative Huckaby expressed the view that "[i]t was clearly not the intent of Congress that such operations would qualify for such vast sums; if this operation does receive the reported 1.4 million dollars, it will only happen because [the Department] has failed to implement and enforce the law as intended by Congress." *Ibid.* The letter urged the Secretary "to carefully review the Tunica County, Mississippi case and any other similar operations," and stated that he would introduce legislation making all trusts ineligible for payments if the Department could not correct the situation. *Ibid.*[4]

In response to Representative Huckaby, Assistant Deputy Administrator Penn drafted a letter, which was signed by Deputy Under Secretary for International Affairs and Commodity Programs Campbell on behalf of Under Secretary of Agriculture Richard Crowder. The letter stated that specific case mentioned in the Audit Report was "under review" and that the Department would "take a very aggressive position in dealing with" it. RA 52. The letter did not suggest what the outcome of the review would be, and suggested that petitioners' reorganization might be permitted under a provision in the 1987 amendments allowing for "equitable reorganization" of farming operations. *Ibid.*

[4] Representative Huckaby's letter further stated (RA 51):

> In the case of this [Tunica County] operation, the reorganization was clearly designed and carried out to evade the law applicable to payment eligibility. * * * It seems clear that this reorganization was adopted as a device to avoid the payment eligibility law, and I strongly urge you to invoke the scheme or device provision to enforce the payment eligibility law. This provision of the law was adopted for this purpose.

c. In the Spring of 1990, as part of the ongoing review of petitioners' 1989 operations, the Deputy Administrator concluded that he would make an initial determination regarding petitioners' 1990 operating plans, as authorized by regulation (see 7 C.F.R. 1497.2(d)). RT 100. The Deputy Administrator notified the state committee that petitioners' 1990 operating plans should be submitted, after county committee review, to the Deputy Administrator for final determination. RA 60. The county committees were directed not to issue a determination on these plans until the Deputy Administrator's review was completed. *Ibid.*

On June 1, 1990, the Deputy Administrator issued a decision in the form of three letters signed by Assistant Deputy Administrator Penn as Acting Deputy Administrator. The letters concluded that petitioners had adopted schemes or devices to evade the payment limitation provisions for both the 1989 and 1990 crop years. RA 67-70, 76. The decision did not rely on the reasoning of the Audit Report or Representative Huckaby's letter. Instead, the Deputy Administrator concluded that the so-called "irrevocable" trusts were not irrevocable at all, and were merely fictitious entities established to evade the three permitted entity rule.[5] The Deputy Ad-

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[5] The underlying bases for the decision were, *inter alia*, that some of the trusts had in fact been revoked; that some of the trusts ceased to exist at the time new regulations would have treated the trusts as revocable and combined them with the interests of the grantors for purposes of determining the number of persons eligible for federal subsidies; that the terms of some trusts had been violated by improper transfer of trust property; and that the purchase of some trust interests was financed with non-recourse loans with little or no risk to the buyers. See Gov't C.A. Br. 13-16.

ministrator accordingly disqualified petitioners from participating in farm subsidy programs for the 1989, 1990 and 1991 crop years.

Petitioners appealed and requested a hearing, which was set for December 12, 1990. Donald Lloyd, the Department official assigned to act as hearing officer, was not involved in the decision rendering petitioners ineligible for farm subsidies; he had, however, reviewed the letter sent in response to Representative Huckaby's inquiry. Prior to the hearing, petitioners became aware of the earlier meeting with congressional staffers and the letter from Representative Huckaby. The day before the scheduled hearing, petitioners requested that the Deputy Administrator disqualify the hearing officer assigned to their case and all employees and officials of the Department's national office. RA 17-32. That request was denied. RA 114.

4. Petitioners immediately filed the present action in district court, seeking declaratory and injunctive relief against the Secretary of Agriculture, the Department, and ASCS. The complaint alleged that petitioners' due process rights had been violated as a result of improper congressional interference, and that the Department's conduct was arbitrary and capricious and an abuse of discretion in violation of the Administrative Procedure Act (APA), 5 U.S.C. 706. RA 2. Petitioners sought reinstatement of the county committee decisions approving their 1989 operating plans, and an injunction prohibiting the Secretary of Agriculture and the "national level" of the Department from participating in the determination of petitioners' eligibility for subsidies for the 1990 and 1991 crop years. RA 13-14.

The district court granted petitioners' request for a permanent injunction. Holding that agency action

can be invalidated "where the mere appearance of bias or pressure can be shown," the district court found that the letter from Representative Huckaby, along with the meeting with congressional staffers, "exerted impermissible influence upon officials at the national level of the Department of Agriculture in an effort to dictate the outcome of those proceedings." Pet. App. 8c-9c. The district court also held that petitioners' failure to exhaust their administrative remedies did not preclude judicial action, since the agency proceeding was "so impermissively tainted by Congressional interference that it render[ed] further administrative procedures futile." *Id.* at 11c-12c. The district court accordingly vacated the Deputy Administrator's decisions concluding that petitioners had adopted a scheme or device to evade the three permitted entity rule, and permanently enjoined the "national level" of the Department from participating in any determinations or administrative appeals concerning the petitioners' eligibility for federal farm program benefits for the 1989-1991 crop years. *Id.* at 16c-17c.

5. The court of appeals reversed. The court held that the "mere appearance of bias" standard used in *Pillsbury Co.* v. *FTC*, 354 F.2d 952 (5th Cir. 1966), was inapplicable in this case because the proceedings had not yet reached the stage when they could fairly be called judicial or quasi-judicial. Pet. App. 6a. Noting that the dispute between petitioners and the Department was part of a "larger policy debate," the court held that "[a]pplying *Pillsbury*'s stringent 'mere appearance of bias' standard at this juncture of [the] administrative process would erect no small barrier to Congressional oversight. * * * We are unwilling to so dramatically restrict communications

between Congress and the executive agencies over policy issues." *Id.* at 7a.

Relying on precedent from two other circuits, the court of appeals held that the proper standard for evaluating congressional interference with non-judicial agency proceedings is whether the communication actually caused the agency to consider extraneous factors. Pet. App. 7a-8a. The court noted that "an agency's patient audience to a member of Congress will not by itself constitute the injection of an extraneous factor. Nor would a simple plea for more effective enforcement of law be the injection of an improper factor." *Id.* at 8a. As applied to this case, the court concluded that it was not impermissible for "a congressman [to] express[] the view that the law ought not sanction the use of fifty-one irrevocable trusts to gain $1.4 million in subsidies." *Ibid.*

The court of appeals also held that petitioners' failure to exhaust their administrative remedies was fatal to their claim. Pet. App. 9a-10a. The court concluded that petitioners had failed as a matter of law to produce evidence to show that pursuing the administrative proceedings to a close would have been futile. The fact that the hearing officer assigned to petitioners' case had read a letter involving petitioners' situation was "weak evidence that pursuing administrative appeals would have been futile," *id.* at 10a, and petitioners had in any event failed to request that the hearing officer assigned to their case be replaced. Instead, petitioners sought the disqualification of the Department's entire national office. To the extent petitioners thought that they were harmed by the consideration of extraneous factors, the court held, they were free to make that argument

on appeal from the Deputy Administrator's final decision. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision by this Court or another court of appeals. Further review is therefore unwarranted.

1. a. A claim alleging impermissible bias on the part of an agency decisionmaker must overcome the "presumption of honesty and integrity in those serving as adjudicators." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). Such individuals "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." 421 U.S. at 55, quoting *United States* v. *Morgan*, 313 U.S. 409, 421 (1941).

This presumption of regularity imposes a heavy burden on a plaintiff seeking to show that a decisionmaker is biased. For example, in *FTC* v. *Cement Institute*, 333 U.S. 683 (1948), members of the Federal Trade Commission expressed the view in congressional hearings that a particular pricing system constituted an unlawful restraint of trade. See *id.* at 700. Proceeding "on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations," *ibid.*, the Court nevertheless refused to find bias, and rejected a due process challenge to an agency proceeding challenging the pricing system at issue. The Court stated that "the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject." *Id.* at 701. Since the plaintiffs

were entitled to participate in the agency proceedings challenging their conduct, they "were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities." *Ibid.*[6]

The Fifth Circuit followed *Cement Institute* in *United States* v. *Batson*, 782 F.2d 1307, cert. denied, 477 U.S. 906 (1986), a case similar to this case. In *Batson*, the court refused to vacate an ASCS determination that the plaintiffs had employed a scheme or device to evade payment limitations under the Upland Cotton Price Support Program, even though the hearing officer had publicly stated that "those people in Gaines County had bilked the government out of six million dollars." 782 F.2d at 1313-1314. The court stated that "[e]ven were we to assume that the hearing officers had decided beforehand that the facts constituted a prohibited scheme or device, no violation of due process would be present." *Id.* at 1314. The court noted that the plaintiffs had an opportunity to point out their version of the facts in an administrative hearing, and that the evidence was insufficient to show that the mind of the hearing officer was "irrevocably closed." *Id.* at 1314-1315.

The court of appeals' decision in this case merely applies these longstanding principles of due process

[6] See also *Hortonville Joint School Dist. No. 1* v. *Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) ("[m]ere familiarity with the facts of a case" does not disqualify a decisionmaker); *Withrow*, 421 U.S. at 55 ("[t]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing"); *Myrick* v. *City of Dallas*, 810 F.2d 1382, 1387 (5th Cir. 1987).

in the context of alleged congressional interference. As *Cement Institute* and *Batson* make clear, the fact that a decisionmaker adopts a view during the investigative stage of the proceedings does not violate due process, especially where a party has an opportunity to present facts and legal arguments in an agency hearing.[7]

In this case, the court of appeals recognized the distinction between contacts occurring during the initial investigative stage of a proceeding and pressure exerted while an adversary hearing is pending. The case on which petitioners principally rely (Pet. 9-10) for their due process argument, *Pillsbury Co.* v. *FTC*, 354 F.2d 952 (5th Cir. 1966), involved the latter situation. There the court held that a congressional investigation that "focuses directly and substantially upon the mental decisional processes of a Commission *in a case which is pending before it*," constitutes impermissible interference in the agency's judicial function. *Id.* at 964. The court noted that "[t]o subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the 'wrong' decision, * * * sacrifices the appearance of impartiality." *Ibid.*

Pillsbury provides no support to petitioners. In contrast to *Pillsbury*, the congressional contact in this case occurred not while a formal adversary hearing was pending, but rather during the conduct of the agency's informal investigation. Like the plaintiffs in *United States* v. *Batson*, *supra*, petitioners were

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[7] We note that petitioners cite no cases from this Court in support of the broad notion of due process that they advance; instead, they ignore altogether the presumption of regularity and this Court's decision in *Cement Institute*.

entitled at a hearing to present evidence and make legal arguments to demonstrate that their operations were not a scheme or device designed to circumvent the law. The court of appeals in this case simply harmonized its own precedents, holding that the principle of *Batson* is applicable instead of *Pillsbury* in cases where *ex parte* contacts occur before a formal adversary hearing is scheduled. The panel in this case did not purport to overrule *Pillsbury*, a case from the same circuit; moreover, even if the cases were in tension, such an intracircuit conflict would not be for this Court to resolve.

b. Petitioners argue (Pet. 12-13) that the distinction between the investigative stage and the formal adversary hearing is an artificial one. In petitioners' view, as long as the Deputy Administrator's ultimate decision regarding whether petitioners violated the payment limitations can be characterized as "adjudicative," *Pillsbury*'s "mere appearance of bias" standard must apply.[8] That contention is without merit.

Contrary to petitioners' contention, the relevant inquiry is not whether the proceeding in general can be characterized as "adjudicative," but whether the allegedly impermissible influence was exerted prior to the time when a formal hearing was pending. For example, the court in *Pillsbury* did not rely on the fact that the agency proceedings were "adjudicative" in nature, but upon the fact that the congressional pressure occurred while formal proceedings were pending in the agency. See 354 F.2d at 964. Moreover,

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[8] We note that *Pillsbury*'s stringent standard was established by the Fifth Circuit, and not this Court. Whether or not the *Pillsbury* standard is correct in the context in which it applies, it simply is not implicated on the facts of this case.

the Fifth Circuit's decision in *Batson* involved the same type of proceeding at issue here—a determination that a party had employed a "scheme or device" to evade ASCS payment limitations. See 782 F.2d at 1309-1310. Yet despite the general "adjudicative" nature of the inquiry, the court held that the decisionmaker's prior stated view in that case did not deprive the plaintiff of due process because the mind of the decisionmaker was not "irrevocably closed." See *id.* at 1314; see also *Cement Institute*, 333 U.S. at 701 (decisionmaker is not precluded from participation in a hearing merely because he was exposed to information during an *ex parte* investigation); *Morris* v. *City of Danville*, 744 F.2d 1041, 1045 (4th Cir. 1984) (decisionmaker who makes an initial decision on the basis of an *ex parte* recommendation is not precluded from participation in a subsequent adjudicative hearing).[9]

Petitioners' effort (Pet. 10-13) to show that the Deputy Administrator's decision is "adjudicative" is therefore beside the point. The cases upon which petitioners rely discuss the distinction between adjudication and rulemaking, and not the distinction between different stages of administrative proceedings. See, *e.g.*, *United States* v. *Florida E. Coast Ry.*, 410 U.S. 224, 244-245 (1973); *Brown* v. *McGarr*, 774 F.2d 777, 780 (7th Cir. 1985). As we have shown, however, even if a proceeding can be characterized as

[9] Congress has also recognized the importance of the distinction between the investigative stage of an administrative action and a formal adversary hearing. The Administrative Procedure Act, for example, does not prohibit *ex parte* contacts until a matter is "noticed for hearing," unless the agency designates otherwise. 5 U.S.C. 557(d)(1)(E); see also *Marketing Assistance Program* v. *Bergland*, 562 F.2d 1305, 1309 n.6 (D.C. Cir. 1977).

adjudicative, a mere appearance of bias is insufficient to establish a due process violation unless a formal hearing is pending.

Under petitioners' theory—that pressure from Congress "[b]y definition" deprived them of due process, Pet. 14—congressional contact at any stage of a proceeding automatically, and irrevocably, disqualifies the agency from taking any further action. That is not the law. See *Peter Kiewit Sons' Co.* v. *United States Army Corps of Eng'rs*, 714 F.2d 163, 169-170 (D.C. Cir. 1983) (standard for judging whether alleged congressional interference in a proceeding to debar a government contractor violates due process is whether "extraneous factors" intruded into the decisionmaker's analysis). Courts have frequently refused to find impermissible congressional interference if the agency's response to congressional pressure is non-committal, or if the agency withstands the pressure. See *Power Auth.* v. *FERC*, 743 F.2d 93, 109-110 (2d Cir. 1984); *Gulf Oil Corp.* v. *Federal Power Comm'n*, 563 F.2d 588, 611 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *American Pub. Gas Ass'n* v. *Federal Power Comm'n*, 567 F.2d 1016, 1070 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978). These cases cannot be reconciled with petitioners' broad view of the requirements of due process in this context.

Petitioners' approach would unduly penalize an agency because a member of Congress communicated with agency officials. Petitioners do not seek relief in the form of an unbiased decision; rather, they claim that the agency is not entitled to act on their case at all, in effect giving them an exemption from the rules established by Congress for farm subsidy programs. There is no basis, however, for imposing a rule that Members of Congress must either refrain from

expressing views on particular matters or forgo enforcement of the law with respect to the situations upon which it comments. See *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 126 (3d Cir. 1981); *Gravel* v. *United States*, 408 U.S. 606, 625 (1972).

Even when subject to such congressional pressure, it remains the responsibility of the Executive Branch to determine how properly to execute the law.[10] Moreover, even if petitioners were correct that the congressional influence in this case was improper, the appropriate course would be to disqualify the individuals exposed to that improper influence. The remedy would not be, as petitioners would have it, to grant petitioners the windfall of disqualifying the the national level of the responsible agency from any part in executing the law.

2. Petitioners also claim (Pet. 14-17) that the court of appeals erred in concluding that they were required to exhaust their administrative remedies before initiating this action. That contention is without merit.

Although a court can waive the exhaustion requirement under some circumstances, it is well settled that "exhaustion is the rule in the vast

[10] Petitioners also characterize (Pet. 13-14) Representative Huckaby's contact with the agency as "subsequent legislative history" that is entitled to no weight. We fail to see how that bears on whether the agency decisionmaker was impermissibly biased. In any event, petitioners were entitled to a hearing at which they would have been free to demonstrate that Representative Huckaby's views were erroneous; moreover, after such a hearing petitioners would have been free to challenge a final adverse decision that they believed was based on an improper view of congressional intent. See Pet. App. 10a. Instead of following those avenues of relief, petitioners filed the present action.

majority of cases." *Bowen* v. *City of New York*, 476 U.S. 467, 486 (1986). To show that exhaustion is not required, petitioners must show that completing the administrative process would not serve the purposes of exhaustion—*i.e.*, that further administrative proceedings would be futile. See *id.* at 485-486; *Cassim* v. *Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). Petitioners do not quarrel with the legal requirement that they demonstrate futility. Instead, they raise the fact-bound claim that the court of appeals erred in concluding that they had not shown that further administrative proceedings would be futile. Further review is unwarranted for that reason alone.

In any case, the court of appeals properly rejected petitioners' claim of futility. Petitioners' argument is based on the assertion that they should not be forced to appeal "to the same decisionmaker that issued the June 1, 1990 decisions appealed from in this action." Pet. 17. The factual assertion underlying petitioners' argument is incorrect. The June 1 decisions were made by William Penn as acting Deputy Administrator. In petitioners' administrative appeal, however, a different person, Donald Lloyd, was designated to serve as hearing officer. RT 98-99, 126. As the court of appeals recognized (Pet. App. 10a), petitioners failed to demonstrate that Lloyd was biased against them or was subjected to undue congressional pressure.

The interests favoring exhaustion in this case are compelling. A hearing would give petitioners an opportunity to present factual and legal arguments to show that their trust arrangements did not violate the statute. If such arguments had merit, the agency would thereby have an opportunity to correct the error in the initial decisions. See *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1086 (1992). In addition, an

administrative hearing would produce a more complete record for subsequent judicial review, an important factor in this factually complex case. See *id.* at 1087. Finally, in view of the fact that exhaustion concerns "apply with particular force" when the proceedings require agency expertise, *id.* at 1086, exhaustion of administrative remedies was particularly important here in order to give the agency an opportunity to apply its expertise in administering the farm subsidy programs.[11]

[11] In a footnote (Pet. 15 n.4), petitioners raise the contention that 5 U.S.C. 704 makes exhaustion the exception rather than the rule, stating that administrative appeals are not a prerequisite to judicial review *unless* a statute or regulation requires otherwise. Petitioners failed to raise that argument either in the district court or in the court of appeals, and therefore are precluded from raising it for the first time in this Court.

In any event, petitioners' argument is incorrect. Where Congress does not require exhaustion explicitly, "sound judicial discretion governs" the issue, and the court must balance the interest in prompt access to the courts against the purposes of exhaustion. *McCarthy* v. *Madigan*, 112 S. Ct. at 1086-1087. Section 704 does nothing to alter this framework. That Section governs the jurisdictional issue of finality and not the issue of whether exhaustion should be required as a matter of sound judicial discretion. See *Missouri* v. *Bowen*, 813 F.2d 864, 870-871 (8th Cir. 1987); *Montgomery* v. *Rumsfeld*, 572 F.2d 250, 253 n.3 (9th Cir. 1978). The same issue is before the Court in *Darby* v. *Kemp*, petition for cert. pending, No. 91-2045, in which we filed our brief in opposition on August 19, 1992.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DCP FARMS, et al., Petitioners

v.

SECRETARY OF AGRICULTURE, et al., Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners are compelled to submit this brief Reply in order to address several erroneous statements of law and fact contained in the Brief for the Respondents in Opposition.

1. Respondents assert that "the cases upon which Petitioners rely discuss the distinction between adjudicative and rulemaking, and not the distinction between different stages of adjudicative proceedings." Brief in Opposition at 15. Yet the distinction between adjudicative and rulemaking proceedings is precisely the distinction relied upon by *Pillsbury Co. v. Federal Trade Comm'n*, 354 F.2d 952 (5th Cir. 1966) and its progeny. Significantly, Respondents now abandon the rationale underlying the Fifth Circuit's decision, *i.e.*, that the agency proceeding involved here was not adjudicative in nature. Virtually conceding that the administrative proceeding in the instant case was adjudicative, they assert, instead, that the relevant inquiry is not whether the proceeding was adjudicative, as required by *Pillsbury*, but whether the impermissible Congressional influence was exerted prior to the time when a "formal hearing" was pending. Brief in Opposition at 14, 16.

Respondents' theory, advanced before this Court for the first time, has been rejected by both the Fifth Circuit in *Pillsbury* and the District of Columbia Circuit in *D.C. Fed'n of Civic Assns. v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972), which clearly held the due process standard employed by the District Court should be applied where Congressional interference occurs in the context of agency adjudicative, as opposed to rulemaking, proceedings.[1]

Respondents' assertion that the *Pillsbury* standard applies only when the Congressional interference takes place prior to a "formal hearing" elevates form over substance, would exclude from due process protection a myriad of agency adjudicative proceedings, and would eviscerate over 25 years of Congressional interference jurisprudence.

2. Contrary to Respondents assertion, Petitioners have never claimed that the Department of Agriculture "is not entitled to act on their case at all." Respondents' Brief at 16. The relief sought by Petitioners, and granted by the District Court, simply cures the adverse effect of the constitutional violation and is

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[1] The cases cited by Respondents in support of this novel theory are inapposite. *United States v. Batson*, 782 F.2d 1307, *cert. denied*, 477 U.S. 906 (1986); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976); *Myrick v. City of Dallas*, 810 F.2d 1382 (5th Cir. 1987); and *Morris v. City of Danville*, 744 F.2d 1041 (4th Cir. 1984), do not involve allegations of impermissible Congressional interference in an agency adjudicative proceeding. As the Fifth Circuit expressly held in *Pillsbury*, the standards used to determine due process violations based upon Congressional interference are not the same as those applied in cases involving bias or prejudgment by decisionmakers in the absence of such interference. 354 F.2d at 965. Similarly, *Power Authority v. FERC*, 743 F.2d 93 (2d Cir. 1984); *Gulf Oil Corp. v. Federal Power Comm'n*, 563 F.2d 588 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978); and *American Pub. Gas Ass'n v. Federal Power Comm'n*, 567 F.2d 1016, (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978), do not involve efforts by Congressmen to dictate the outcome of an agency administrative proceeding as is the case here.

narrowly tailored to fit both the nature and extent of the violation. The District Court did not make a substantive determination regarding Petitioners' eligibility for federal farm program benefits, but instead deferred that determination to the existing, and long-standing, administrative structure utilized by the USDA. For the 1989 crop year, the District Court simply reinstated the decisions already made by the USDA County ASCS Committees approving Petitioners farm operating plans. For the 1990 and 1991 crop years, the District Court remanded the matter to the County Committees, and limited administrative appeals to the Mississippi State ASCS Committee. The District Court did *not* instruct the County Committees to approve the operating plans.

Under regulations promulgated by the USDA, the County Committees have been given the responsibility of carrying out the programs administered by ASCS. 16 U.S.C. § 590h(b); 7 C.F.R. § 7.21(a); RA 146. Among the specific responsibilities of the County Committees are to make an initial decision regarding a producer's eligibility for benefits under the federal farm payment programs. RA 57. Traditionally, the national level of the USDA has played an extremely limited role in farm program determinations. For example, in Fiscal Year 1987 the ASCS county offices processed 4,037 administrative *appeals* (this number excludes the original determinations which were never appealed), the state offices processed 729 appeals, and the national office processed only 211 appeals. RA 282-84.

Thus, under the relief ordered by the District Court, the impermissible Congressional interference that occurred in this case would be remedied by remanding the matter to those with administrative authority to decide who were untainted by the Congressional interference and unaffected by the threat of legislative retaliation.

3. Finally, Respondents' assertion that Petitioners have failed to show that further administrative proceedings would be

futile because a person other than the decisionmaker subjected to the Congressional interference was designated to serve as a hearing officer at the reconsideration hearing totally mischaracterizes the nature of the adjudicative process at USDA. As the June 1, 1990 determinations themselves made clear, any such reconsideration request in this case would have been made to, and decided by, DASCO itself. RA 69, 73, 76. The hearing officer's role in ASCS administrative appeals is an extremely limited one. Contrary to Respondents' suggestion, it is DASCO, not the ASCS hearing officer, that decides all reconsideration requests of its initial determinations. Christopher R. Kelley and John S. Harbison, *A Guide to the ASCS Administrative Appeal Process and to the Judicial Process of ASCS Decisions*, 36 U. S. Dak. L. Rev. 14, n.187 (1991).

For the foregoing reasons, as well as those set forth in the Petition for Writ of Certiorari, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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